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THE LAW
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THIRD EDITION

BY

WILLIAM FREDERICK WEBSTER, M.A.

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PREFACE

TO

THE THIRD EDITION

IN this edition will be found, in addition to the reported decisions down to the end of the year 1906, a few cases which have not been reported, including, in the Addenda, a case decided in December 1906 and another decided in January 1907. It may be said that the reporters are the best judges whether a case should be reported or not, and that any reference in a text-book to an otherwise unreported case is useless for the purpose of citation in Court, as the facts may be inadequately stated. But the practitioner, when he is advising, may be glad to have the assistance of an unreported decision, although that decision could not perhaps be made use of in Court owing to the want of a sufficient report. And as regards the absence of facts, some unreported decisions referred to in this Edition decide a neat point, which can be just as well stated in five or six lines as in three or four pages: thus the decision in *Brasier v. Morton* (see foot of p. 2)

that it is a misdescription to describe as a mortgage “at $4\frac{1}{2}$ per cent.” a mortgage whereby interest was reserved at a higher rate reducible to $4\frac{1}{2}$ on punctual payment, needs no elaboration or amplification.

Following a useful practice adopted in many modern text-books, I have inserted in the text the year in which each case was decided.

The Appendix of Precedents has been omitted from this Edition.

W. F. W.

January 1907.

CONTENTS

PART I

PARTICULARS OF SALE AND THE PURCHASER'S REMEDIES FOR A MISDESCRIPTION BY THE VENDOR

CHAP.	PAGE
I. MISDESCRIPTION	1
II. MISREPRESENTATION	10
III. NON-DISCLOSURE	30
IV. AMBIGUITY	40
V. MAP OR PLAN	43
VI. NOTICE	49
VII. MISTAKE	52
VIII. FRAUD	60
IX. MISDESCRIPTION DANS LOCUM CONTRACTU	67
X. ESSENTIAL MISDESCRIPTION	78
XI. VENDOR COMPELLED TO MAKE GOOD HIS REPRESENTATION	95
XII. COMPENSATION	99
XIII. INDEMNITY	123
XIV. RECOVERY OF DEPOSIT	126
XV. DAMAGES	130
XVI. RELIEF IN CASE OF PAROL VARIATION	139
XVII. RELIEF AFTER COMPLETION	152

PART II

CONDITIONS OF SALE

XVIII. GENERAL REMARKS	156
XIX. THE AUCTION	163
XX. TIMBER AND FIXTURES	175

CHAP.		PAGE
XXI.	TITLE	184
XXII.	COMPENSATION	279
XXIII.	CONDITIONS RELATING TO COMPLETION	300
XXIV.	RESCISSIOn BY VENDOR	355
XXV.	THE CONVEYANCE	376
XXVI.	TITLE DEEDS	399
XXVII.	EXPENSES	409
XXVIII.	FORFEITURE OF DEPOSIT AND RE-SALE	415
XXIX.	SALE IN LOTS	425
XXX.	SALES BY TRUSTEES AND MORTGAGEES. DEPRE- CIATORY CONDITIONS	431
XXXI.	PARTICULARS AND CONDITIONS ON A SALE BY THE COURT	442

PART III

XXXII.	THE MEMORANDUM	446
INDEX		461

TABLE OF CASES

NOTE.—The current series of the *Law Journal* and *Law Times* are cited thus: 1 L. J. Ch. 1, and 1 L. T. 1. The old series is distinguished by the addition of the letters 'o.s.' In the case of the *Jurist* the new series is distinguished by the addition 'N.S.'

A		PAGE
ABBOTT <i>v.</i> DARNELL, 4 W. R. 314; 2 Jur. N.S. 631		414
Abbott <i>v.</i> Sworder, 4 De G. & S. 448; 22 L. J. 235; 19 L. T. o.s. 311		35
Aberaman Works <i>v.</i> Wickens, 4 Ch. 101; 20 L. T. 89; 17 W. R. 211		76, 85, 253
Acland <i>v.</i> Gaisford, 2 Mad. 28; 17 R. R. 177	316, 324, 328, 330, 333, 334, 341	
Adams <i>v.</i> Scott, 7 W. R. 213		441
Adamson <i>v.</i> Evitt, 2 Russ & M. 66; 9 L. J. Ch. 1		35
Addie's Charity, Ex parte, 3 Ha. 22		411
Aiton <i>v.</i> Stephen, 1 App. Ca. 456		38
Alderson <i>v.</i> Maddison. See Maddison <i>v.</i> Alderson.		
Alexander <i>v.</i> Mills, 6 Ch. 124; 40 L. J. Ch. 73; 24 L. T. 206; 19 W. R. 310	198, 199, 208, 209	
Allen and Driscoll, (1904) 2 Ch. 226; 73 L. J. Ch. 614; 91 L. T. 676; 52 W. R. 681	212, 259, 345, Add.	
Allen <i>v.</i> Clark, 7 L. T. 781; 11 W. R. 304	240, 263, 402	
Allen <i>v.</i> Richardson, 13 Ch. D. 524; 49 L. J. Ch. 137; 41 L. T. 615; 28 W. R. 313	57, 292	
Anderton and Milner, 45 Ch. D. 476; 59 L. J. Ch. 765; 63 L. T. 332; 39 W. R. 44	29	
Andrew <i>v.</i> Aitken, 22 Ch. D. 218; 52 L. J. Ch. 294; 48 L. T. 148; 31 W. R. 425	28	
Angell <i>v.</i> Duke, L. R. 10 Q. B. 174; 44 L. J. Q. B. 78; 32 L. T. 25; 23 W. R. 307	146	
Anker <i>v.</i> Franklin, 43 L. T. 317	342	
Annesley <i>v.</i> Mugeridge, 1 Mad. 593; 16 R. R. 273	174	
Anspach <i>v.</i> Noel, 1 Mad. 310; 16 R. R. 227	273, 274, 275	
Arbib and Class, (1891) 1 Ch. 601; 60 L. J. Ch. 263; 64 L. T. 217; 39 W. R. 305	373	
Archdale <i>v.</i> Anderson, 21 L. R. Ir. 527	96	
Armytage, Re, 14 Ch. D. 379; 49 L. J. Bkey. 60; 42 L. T. 413; 28 W. R. 924	177, 178	

	PAGE
Arnold, <i>Re</i> (or <i>Arnold v. Arnold</i>), 14 Ch. D. 270; 42 L. T. 705; 28 W. R. 635	1, 10, 24, 27, 43, 80, 87, 126, 127, 443
Arnot <i>v. Biscoe</i> , 1 Ves. sen. 95	65
Ashburner <i>v. Sewell</i> , (1891) 3 Ch. 405; 60 L. J. Ch. 784; 65 L. T. 524; 40 W. R. 169	31, 33
Ashton <i>v. Wood</i> , 3 Sm. & G. 436; 3 Jur. n.s. 1164	207, 374
Ashworth <i>v. Mounsey</i> , 9 Ex. 175; 23 L. J. Ex. 73; 22 L. T. o.s. 121; 2 W. R. 41; 2 Com. L. R. 418	40, 237
Aspinalls to Powell, 60 L. T. 595	104, 108, 293
Att.-Gen. <i>v. Christchurch</i> , 13 Sim. 214; 12 L. J. Ch. 28; 5 Jur. 1007; 60 R. R. 334	326
Att.-Gen. <i>v. Day</i> , 1 Ves. sen. 218	446
Attwood <i>v. Small</i> , 6 Cl. & F. 232; 2 Jur. 226; 49 R. R. 115	25, 70, 72
Attwood <i>v. Taylor</i> , 1 Man. & Gr. 279; 1 Sc. N. R. 611	328
Aubrey <i>v. Fisher</i> , 10 East, 446	175
Austin <i>v. Croome</i> , Car. & M. 653	403
Austin <i>v. Tawney</i> , 2 Ch. 143; 36 L. J. Ch. 339; 15 W. R. 463	210
Ayles <i>v. Cox</i> , 16 Beav. 23; 20 L. T. o.s. 4	73, 82, 282
Aylett <i>v. Ashton</i> , 1 My. & Cr. 105; 5 L. J. Ch. 71	124, 128

B

Backhouse <i>v. Mellor</i> , 4 H. & N. 116; 28 L. J. Ex. 141; 5 Jur. n.s. 175	<i>Add.</i>
Baglehole <i>v. Walters</i> , 3 Camp. 154; 13 R. R. 778	24
Bailey <i>v. Collett</i> , 18 Beav. 179; 23 L. J. Ch. 230; 22 L. T. o.s. 313; 2 W. R. 216	327
Bailey <i>v. Piper</i> . See <i>Hooper v. Smart</i> .	
Bain <i>v. Fothergill</i> , L. R. 7 H. L. 158; 43 L. J. Ex. 243; 31 L. T. 389; 23 W. R. 261	130, 131, 132, 133, 138, 335
Bainbridge <i>v. Kinnaird</i> , 32 Beav. 346; 8 L. T. 447; 2 N. R. 5; 11 W. R. 608; 9 Jur. n.s. 862	118, 125
Baker and Selmon, 1907, W. N. 22	<i>Add.</i>
Baker <i>v. Bent</i> , 1 Russ. & My. 224; Tam. 368	108
Balfour <i>v. Welland</i> , 16 Ves. 151	210
Ballard <i>v. Shutt</i> , 15 Ch. D. 122; 49 L. J. Ch. 618; 43 L. T. 173; 29 W. R. 73	326
Ballard <i>v. Way</i> , 1 M. & W. 520; 2 Gale, 61; Tyr. & G. 851; 5 L. J. Ex. 207; 46 R. R. 387	38
Balmanno <i>v. Lumley</i> , 1 Ves. & B. 224; 12 R. R. 215	124
Banister, <i>Re</i> , 12 Ch. D. 131; 48 L. J. Ch. 837; 40 L. T. 828; 27 W. R. 826	158, 232, 234, 443
Bank of Ireland <i>v. Brookfield Linen Co.</i> , 15 L. R. Ir. 37	247, 249
Bankes <i>v. Small</i> , 36 Ch. D. 716; 56 L. J. Ch. 832; 57 L. T. 292; 35 W. R. 765	96
Bannerman <i>v. Clarke</i> , 3 Drew. 632; 26 L. J. Ch. 27; 28 L. T. o.s. 96; 5 W. R. 37	319, 330, 331
Barclay <i>v. Messenger</i> , 43 L. J. Ch. 449; 30 L. T. 351; 22 W. R. 522	302, 308
Barclay <i>v. Raine</i> , 1 S. & St. 449; 24 R. R. 206	407

	PAGE
Barker v. Cox, 4 Ch. D. 464 ; 46 L. J. Ch. 62 ; 35 L. T. 662 ; 25 W. R. 138	113, 214
Barnard v. Cave, 26 Beav. 253 ; 7 W. R. 158	145
Barnes v. Wood, 8 Eq. 424 ; 38 L. J. Ch. 683 ; 21 L. T. 227 ; 17 W. R. 1080	100, 108, 113
Barnett v. Wheeler, 7 M. & W. 364 ; 10 L. J. Ex. 102	211, 212
Barraud v. Archer, 2 Sim. 433 ; 2 Russ. & M. 751 ; 9 L. J. o.s. Ch. 173 ; 29 R. R. 129	37
Barrell, Ex parte, 10 Ch. 512 ; 44 L. J. Bkey. 138 ; 33 L. T. 115 ; 23 W. R. 846	415
Barrett v. Ring, 2 Sm. & G. 43	96
Barsht v. Togg, (1900) 1 Ch. 231 ; 69 L. J. Ch. 91 ; 81 L. T. 777 ; 48 W. R. 220	340, 343, 346
Bartlett v. Salmon, 6 D. M. & G. 33 ; 1 Jur. n.s. 277 ; 26 L. T. o.s. 82 ; 4 W. R. 32	2 74
Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259 ; 36 L. J. Ex. 147 ; 16 L. T. 461 ; 15 W. R. 877	64
Bascomb v. Beekwith, 8 Eq. 100 ; 38 L. J. Ch. 536 ; 20 L. T. 862 ; 17 W. R. 812	48
Baxendale v. Seale, 19 Beav. 601 ; 24 L. J. Ch. 385 ; 24 L. T. o.s. 306 ; 1 Jur. n.s. 581	55, 57, 59
Beattie v. Ebury, L. R. 7 H. L. 102 ; 44 L. J. Ch. 20 ; 30 L. T. 581 ; 22 W. R. 897	21
Beaumont v. Dukes, Jac. 422 ; 23 R. R. 110	22
Bebb v. Bunny, 1 K. & J. 216 ; 1 Jur. n.s. 203	333
Bedingfield and Herring, (1893) 2 Ch. 332 ; 62 L. J. Ch. 430 ; 68 L. T. 634 ; 41 W. R. 413	380
Beeston v. Stutely, 27 L. J. Ch. 156 ; 6 W. R. 206	214
Beioley v. Carter, 4 Ch. 230 ; 38 L. J. Ch. 92, 283 ; 20 L. T. 381 ; 17 W. R. 300	204, 208, 228
Bell v. Balls, (1897) 1 Ch. 663 ; 66 L. J. Ch. 397 ; 76 L. T. 254 ; 45 W. R. 378	170, 448, 449
Bell v. Holtby, 15 Eq. 178 ; 42 L. J. Ch. 266 ; 28 L. T. 9 ; 21 W. R. 321	208
Bellairs v. Tucker, 13 Q. B. D. 562	18
Bellamy v. Debenham, (1891) 1 Ch. 412 ; 60 L. J. Ch. 166 ; 64 L. T. 478 ; 39 W. R. 257	51, 69, 271, 301, 310, 311, 312
Belton, Re. See Betton's Trust Estate.	
Bennet College v. Carey, 3 Bro. C. C. 390	128
Bennett v. Brumfitt, L. R. 3 C. P. 28	447
Bennett v. Stone, (1903) 1 Ch. 509 ; 72 L. J. Ch. 240 ; 88 L. T. 35 ; 50 W. R. 118	320, 322, 341, 342, 344, 382
Bennett v. Wheeler, 1 Ir. Eq. R. 18	443
Bennett v. Womack, 7 B. & C. 627 ; 3 C. & P. 96 ; 1 M. & R. 624 ; 6 L. J. o.s. K. B. 175 ; 31 R. R. 270	27, 28
Benson v. Lamb, 9 Beav. 502 ; 15 L. J. Ch. 218 ; 7 L. T. o.s. 385 ; 73 R. R. 415	307, 380
Bentley v. Craven, 17 Beav. 204 ; 21 L. T. o.s. 215 ; 1 W. R. 362	7
Berry v. Young, 2 Esp. 640 n.	399
Besant v. Richards, Tam. 509	113
Besley v. Besley, 9 Ch. D. 103 ; 38 L. T. 844 ; 27 W. R. 184	153

	PAGE
Best <i>v.</i> Hamand, 12 Ch. D. 1 ; 48 L. J. Ch. 593 ; 40 L. T. 769 ; 27 W. R. 742	158, 221, 232, 373
Bettesworth and Richer, 37 Ch. D. 535 ; 57 L. J. Ch. 749 ; 58 L. T. 796	346
Betton's Trust Estate, Re, 12 Eq. 553 ; 25 L. T. 404 ; 19 W. R. 1052	194
Betts <i>v.</i> Burch, 4 H. & N. 506 ; 28 L. J. Ex. 267 ; 33 L. T. o.s. 151 ; 7 W. R. 546	422
Bexwell <i>v.</i> Christie, Cowp. 395	167
Beyfus and Masters, 39 Ch. D. 110 ; 59 L. T. 740 ; 37 W. R. 261. 41, 83, 281, 282, 294, 297	
Biggs <i>v.</i> Bree, 51 L. J. Ch. 263 ; 46 L. T. 8 ; 30 W. R. 278	173
Bingham <i>v.</i> Bingham, 1 Ves. sen. 126	58, 154
Binks <i>v.</i> Rokeby, 2 Swa. 222 ; 19 R. R. 68	80, 90, 326, 379
Birch <i>v.</i> Joy, 3 H. L. C. 565	326, 327, 329
Birch <i>v.</i> Podmore, Sug. 635.	323
Bird <i>v.</i> Andrew, 4 Times L. R. 31	5, 89
Bird <i>v.</i> Boulter, 1 Nev. & M. 313 ; 4 B. & Ad. 446 ; 38 R. R. 285	448, 449
Bird <i>v.</i> Fox, 11 Hare, 40	223, 254
Birkbeck, &c. Society, Ex parte, 24 Ch. D. 119 ; 52 L. J. Ch. 777 ; 49 L. T. 265 ; 31 W. R. 716	261, 262
Birmingham, &c. and Allday, (1893) 1 Ch. 342 ; 62 L. J. Ch. 90 ; 67 L. T. 850 ; 41 W. R. 189	393, 427
Bishop <i>v.</i> Taylor, 60 L. J. Q. B. 556 ; 64 L. T. 529 ; 39 W. R. 542	28
Blachford <i>v.</i> Kirkpatrick, 6 Beav. 232 ; 12 L. J. Ch. 108	458
Blackburn <i>v.</i> Smith, 2 Ex. 783 ; 18 L. J. Ex. 187	264, 265, 268
Blacklow <i>v.</i> Laws, 2 Ha. 40 ; 6 Jur. 1121 ; 62 R. R. 11	264, 270
Blagden <i>v.</i> Bradbear, 12 Ves. 466 ; 8 R. R. 354	453
Blalberg <i>v.</i> Keeves, (1906) 2 Ch. 175 ; 75 L. J. Ch. 464 ; 54 W. R. 451	156, 157, 229
Blake <i>v.</i> Phinn, 3 C. B. 976 ; 16 L. J. C. P. 159 ; 71 R. R. 540	217
Blakesley <i>v.</i> Whieldon, 1 Ha. 176 ; 11 L. J. Ch. 164 ; 6 Jur. 54.	393
Bleakley <i>v.</i> Smith, 11 Sim. 150	447
Blenkhorn <i>v.</i> Penrose, 43 L. T. 668 ; 29 W. R. 237	248
Bliss <i>v.</i> Collins, 4 Mad. 229 (on app. 5 B. & Ald. 876)	2
Boehm <i>v.</i> Wood, 1 Jac. & W. 419 ; T. & R. 332 ; 21 R. R. 213	304
Boles and British Land Co., (1902) 1 Ch. 244 ; 71 L. J. Ch. 130 ; 85 L. T. 607 ; 50 W. R. 185	199
Bolingbroke's Case, 1 Sch. & Lef. 19 n.	96
Bolton <i>v.</i> Bolton, 11 Ch. D. 968 ; 48 L. J. Ch. 467 ; 40 L. T. 582	46, 382
Bolton <i>v.</i> Lambert, 41 Ch. D. 295 ; 58 L. J. Ch. 425 ; 60 L. T. 687 ; 37 W. R. 434	314, 354
Bolton <i>v.</i> London School Board, 7 Ch. D. 766 ; 47 L. J. Ch. 461 ; 38 L. T. 277 ; 26 W. R. 549	256, 353
Boor, Re, 40 Ch. D. 572 ; 58 L. J. Ch. 285 ; 60 L. T. 412 ; 37 W. R. 349	346
Borell <i>v.</i> Dann, 2 Ha. 440	434, 435, 439
Bos <i>v.</i> Helsham, L. R. 2 Ex. 72 ; 36 L. J. Ex. 20 ; 15 L. T. 481 ; 15 W. R. 259 ; 1 H. & C. 612	154, 160, 180, 183, 291, 292
Boswell <i>v.</i> Mendham, 6 Mad. 373 ; 1 L. J. o.s. Ch. 160 ; 23 R. R. 250	198

	PAGE
<i>Boughton v. Jewell</i> , 15 Ves. 176.	408, 414
<i>Bourdillon v. Collins</i> , 24 L. T. 344 ; 19 W. R. 556	452
<i>Bourne v. London and County Land Co.</i> , 1885, W. N. 109	299
<i>Bousfield v. Hodges</i> , 33 Beav. 90	277
<i>Bower v. Cooper</i> , 2 Ha. 408 ; 11 L. J. Ch. 287 ; 6 Jur. 681	185, 393
<i>Bowles v. Atkinson</i> , Sug. 334	75
<i>Bowles v. Round</i> , 5 Ves. 508 ; 5 R. R. 107	33, 164
<i>Bowman v. Hyland</i> , 8 Ch. D. 588 ; 47 L. J. Ch. 581 ; 39 L. T. 90 ; 26 W. R. 877	270, 359, 371
<i>Bown v. Stenson</i> , 24 Beav. 631	274
<i>Boyd v. Dickson</i> , 10 Ir. R. Eq. 239	272
<i>Brall, Re</i> , (1893) 2 Q. B. 381 ; 62 L. J. Q. B. 457 ; 69 L. T. 323 ; 41 W. R. 623	191
<i>Bramley v. Alt</i> , 3 Ves. 620	168, 431
<i>Brandly (or Brandling) v. Plummer</i> , 2 Drew. 427 ; 23 L. J. Ch. 960 ; 23 L. T. o.s. 329 ; 2 W. R. 662 ; 2 Eq. Rep. 1260	5
<i>Brasier v. Morton</i> (not reported)	3
<i>Bray v. Briggs</i> , 20 W. R. 962 ; 26 L. T. 817	54
<i>Brealey v. Collins</i> , You. 317 ; 34 R. R. 277	17, 51, 69
<i>Brett v. Clowser</i> , 5 C. P. D. 376	29, 148, 149, 152, 154
<i>Brewer and Hankin</i> , 80 L. T. 127	92, 287
<i>Brewer v. Broadwood</i> , 22 Ch. D. 105 ; 52 L. J. Ch. 136 ; 47 L. T. 508 ; 31 W. R. 115	39, 83, 186, 304, 311
<i>Brewer v. Brown</i> , 28 Ch. D. 309 ; 54 L. J. Ch. 605.	3, 5, 90, 283
<i>Bridges v. Robinson</i> , 3 Mer. 694.	327
<i>Bridgman v. Daw</i> , 40 W. R. 253	390
<i>Briggs and Spicer</i> , (1891) 2 Ch. 127 ; 60 L. J. Ch. 514 ; 64 L. T. 187 ; 39 W. R. 377	193, 194, 202
<i>British Mutual, &c. v. Charnwood Forest, &c.</i> , 18 Q. B. D. 714 ; 51 L. J. Q. B. 449 ; 57 L. T. 833 ; 35 W. R. 590.	64
<i>Brooke, Re</i> , (1894) 2 Ch. 600 ; 63 L. J. Ch. 159 ; 70 L. T. 71 ; 42 W. R. 186	441
<i>Brooke v. Champernowne</i> , 4 Cl. & F. 589.	316, 327
<i>Brooke v. Garrod</i> , 2 D. & J. 62	262
<i>Brooke v. Rounthwaite</i> , 5 Ha. 298 ; 15 L. J. Ch. 332 ; 10 Jur. 656	67, 76, 79, 89, 120
<i>Brookes v. Drysdale</i> , 3 C. P. D. 52 ; 37 L. T. 467 ; 26 W. R. 331	28
<i>Broom v. Phillips</i> , 74 L. T. 459	42, 51, 247
<i>Broomfield v. Williams</i> , (1897) 1 Ch. 602 ; 66 L. J. Ch. 305 ; 76 L. T. 243 ; 45 W. R. 469	8, 48
<i>Brown v. Dibbs</i> , 37 L. T. 171 ; 25 W. R. 776.	351
<i>Brown v. Farebrother</i> , 58 L. J. Ch. 3 ; 59 L. T. 822	173
<i>Brown v. Smith</i> , 8 Dowl. P. C. 867	302
<i>Brown v. Wales</i> , 15 Eq. 142	266
<i>Browne v. Paull</i> , 26 L. T. o.s. 232 ; 2 Jur. n.s. 317	161, 390, 395, 444
<i>Browne v. Warnock</i> , 7 L. R. Ir. 3	196
<i>Brownlie v. Campbell</i> , 5 App. Ca. 925 ; 7 Rett. H. L. 66	38, 60, 61, 62, 63, 152
<i>Brumfit v. Morton</i> , 3 Jur. n.s. 1198 ; 30 L. T. o.s. 98	41, 247, 250

	PAGE
Bryant and Barningham, 44 Ch. D. 218 ; 59 L. J. Ch. 636 ; 63 L. T. 20 ; 38 W. R. 469	311, 313
Bryant <i>v.</i> Busk, 4 Russ. 1 ; 28 R. R. 1	400
Buchanan <i>v.</i> Poppleton, 4 C. B. n.s. 20 ; 27 L. J. C. P. 210 ; 4 Jur. n.s. 414 ; 6 W. R. 372	255, 256
Buckland <i>v.</i> Papillon, 2 Ch. 67 ; 36 L. J. Ch. 81 ; 15 L. T. n.s. 378 ; 15 W. R. 92 ; 12 Jur. 155	28
Buckley <i>v.</i> Howell, 29 Beav. 546 ; 7 Jur. n.s. 536 ; 30 L. J. Ch. 525 ; 4 L. T. 172, 390 ; 9 W. R. 544	433
Buckmaster <i>v.</i> Harrop, 13 Ves. 456 ; 6 R. R. 132	425, 446, 448, 453
Bull <i>v.</i> Hutchens, 32 Beav. 615 ; 8 L. T. 716 ; 9 Jur. n.s. 954 ; 11 W. R. 866 ; 2 N. R. 306	190, 222, 260
Bumbury's Estate, Re, Ir. R. 1 Eq. 458	118
Burke <i>v.</i> Annis, 11 Hare, 232	211
Burnaby <i>v.</i> Eq. Rev. Soc., 28 Ch. D. 416 ; 54 L. J. Ch. 466 ; 52 L. T. 350 ; 33 W. R. 639	267
Burnell <i>v.</i> Brown, 1 Jac. & W. 168	92, 122, 275, 328
Burnell <i>v.</i> Firth, 15 W. R. 546	189, 210
Burrough <i>v.</i> Skynner, 5 Burr. 2639	173
Burroughes <i>v.</i> Browne, 9 Ha. 609 ; 22 L. J. Ch. 148	333
Burrow <i>v.</i> Scammell, 19 Ch. D. 175 ; 51 L. J. Ch. 296 ; 45 L. T. 606 ; 30 W. R. 310 ; 46 J. P. 135	100, 116
Butcher <i>v.</i> Nash, 61 L. T. 72	452
Butterfield <i>v.</i> Heath, 15 Beav. 408 ; 22 L. J. Ch. 270	201
Buxton, Ex parte, 15 Ch. D. 289 ; 43 L. T. 183 ; 29 W. R. 28	394
Buxton <i>v.</i> Lister, 3 Atk. 383	19
Bygrave <i>v.</i> Metropolitan Board of Works, 32 Ch. D. 147 ; 55 L. J. Ch. 602 ; 54 L. T. 889	334

C

Caballero <i>v.</i> Henty, 9 Ch. 447 ; 43 L. J. Ch. 635 ; 30 L. T. 314 ; 22 W. R. 446	50, 139, 149, 177
Calcraft <i>v.</i> Roebuck, 1 Ves. jun. 221 ; 1 R. R. 126	4, 80, 86, 116, 275, 277, 332
Calverley <i>v.</i> Williams, 1 Ves. jun. 210 ; 1 R. R. 118	55
Camberwell, &c. <i>v.</i> Holloway, 13 Ch. D. 754 ; 49 L. J. Ch. 361 ; 41 L. T. 752 ; 28 W. R. 222	26, 41, 42, 51, 83, 157, 256, 282, 293
Campbell <i>v.</i> Walker, 5 Ves. 678 ; 5 R. R. 135	431
Cann <i>v.</i> Cann, 3 Sim. 447 ; 30 R. R. 184	291
Cann <i>v.</i> Wilson, 39 Ch. D. 39 ; 57 L. J. Ch. 1034 ; 59 L. T. 723 ; 37 W. R. 23	15
Capper, Ex parte. <i>See</i> Re Newman.	
Carew, Re ; 26 Beav. 187 ; 28 L. J. Ch. 218 ; 32 L. T. o.s. 154 ; 7 W. R. 81 ; 4 Jur. n.s. 1290	171
Carlsh <i>v.</i> Salt, (1906) 1 Ch. 335 ; 75 L. J. Ch. 175 ; 94 L. T. 58 ; 54 W. R. 244	30, 39
Carpenter <i>v.</i> Blandford, 3 Man. & Ry. 93 ; 8 B. & C. 575 ; 7 L. J. o.s. K. B. 58	308
Carr <i>v.</i> Lynch, (1900) 1 Ch. 613	452
Carrodus <i>v.</i> Sharp, 20 Beav. 56	325, 343

	PAGE
Carroll v. Keayes, 8 I. R. Eq. 97; 22 W. R. 243	50
Carter and Kenderdine, (1897) 1 Ch. 776; 66 L. J. Ch. 408; 76 L. T. 476; 45 W. R. 484	188, 194, 206
Carter v. Dean of Ely, 7 Sim. 211; 4 L. J. Ch. 132; 40 R. R. 113	303
Carus-Wilson and Greene, 18 Q. B. D. 7; 56 L. J. Q. B. 530; 55 L. T. 864; 35 W. R. 43	179, 182, 183
Carver v. Richards, 1 D. F. & J. 548.	201
Cary-Elwes, Re, (1906) 2 Ch. 143; 75 L. J. Ch. 571; 94 L. T. 845; 54 W. R. 480	376
Casamajor v. Strode, 2 Swa. 347; 1 Wils. C. C. 428	426
Casson v. Roberts, 31 Beav. 613; 32 L. J. Ch. 105; 7 L. T. 588; 11 W. R. 102; 8 Jur. n.s. 1199; 1 N. R. 9	459
Castellain v. Preston, 11 Q. B. D. 380; 52 L. J. Q. B. 366; 49 L. T. 29; 31 W. R. 557	348
Castle v. Wilkinson, 5 Ch. 534; 39 L. J. Ch. 843; 18 W. R. 586	100, 212
Cathrow v. Eade, 4 De G. & S. 527; 21 L. T. o.s. 179	400
Catling v. King, 5 Ch. D. 660; 46 L. J. Ch. 384; 36 L. T. 526; 25 W. R. 550	451
Cato v. Thompson, 9 Q. B. D. 616; 47 L. T. 491	33, 78, 92, 107, 213
Caton v. Caton, 1 Ch. 137 (affid. L. R. 2 H. L. 127); 35 L. J. Ch. 292; 14 L. T. 34; 14 W. R. 267; 12 Jur. n.s. 171	457
Cattell v. Corral, 4 Y. & C. 228; 9 L. J. Ex. Eq. 37	189, 197, 244
Cattell v. Corral, 3 Y. & C. 413	234
Catton v. Bennett, 51 L. T. 70	423
Cave v. Cave, 2 Vern. 508	177
Cavendish v. Cavendish, 10 Ch. 319; 33 L. T. 219; 23 ₄ W. R. 313	433, 445
Chamberlain v. Chamberlain, 1 Sm. & G. App. xxviii.	442
Chamberlain v. Lee, 8 L. J. Ch. 266	171
Chandos v. Talbot, 2 P. Wms. 601	175
Chapman v. Auckland Union, 23 Q. B. D. 294; 58 L. J. Q. B. 504; 61 L. T. 446	137
Cherry v. Anderson, I. R. 10 C. L. 204	173
Chifferiel, Re, 40 Ch. D. 45; 58 L. J. Ch. 263; 60 L. T. 89; 37 W. R. 120	46, 97, 122, 438
Childe and Hodgson, 54 W. R. 234	248
Cholditch v. Jones, (1896) 1 Ch. 42; 65 L. J. Ch. 83; 73 L. T. 528; 44 W. R. 124	174
Cholmeley v. Paxton, 3 Bing. 207; 10 Moo. 246; 28 R. R. 619	433
Cholmondeley v. Clinton, 2 J. & W. 1; 22 R. R. 83	440
Christmas and King (not reported)	391
Church v. Brown, 15 Ves. 258; 10 R. R. 74	386, 388
City of London v. Mitford, 14 Ves. 41; 9 R. R. 234	303
Clapham v. Shillito, 7 Beav. 146	69, 70, 71
Clare v. Lamb, L. R. 10 C. P. 334; 44 L. J. C. P. 177; 32 L. T. 196; 23 W. R. 389	152
Clare Hall v. Harding, 6 Ha. 296; 17 L. J. Ch. 301; 10 L. T. o.s. 439; 12 Jur. 511	354
Clark v. May, 16 Beav. 273; 22 L. J. Ch. 302; 20 L. T. o.s. 164; 1 W. R. 69	378
Clarke v. Faux, 3 Russ. 320; 6 L. J. o.s. Ch. 17	315

	PAGE
Clarke v. Grant, 14 Ves. 519 ; 9 R. R. 336	139
Clarke v. Mackintosh, 4 Giff. 134 ; 7 L. T. 559 ; 9 Jur. n.s. 114 ; 11 W. R. 652	70
Clarke v. Ramuz, (1891) 2 Q. B. 456 ; 60 L. J. Q. B. 679 ; 65 L. T. 657	351, 352
Clarke v. Willott, L. R. 7 Ex. 313 ; 41 L. J. Ex. 197 ; 21 W. R. 73 187, 201, 202	187, 201, 202
Claydon v. Green, L. R. 3 C. P. 511 ; 37 L. J. C. P. 326 ; 18 L. T. 607 ; 16 W. R. 1126	303, 397
Clayton and Barclay, (1895) 2 Ch. 212 ; 64 L. J. Ch. 617 ; 72 L. T. 764 ; 43 W. R. 549	206, 209
Clayton v. Leech, 41 Ch. D. 103 ; 61 L. T. 69 ; 37 W. R. 663	153
Clerk v. Wright, 1 Atk. 12 ; West, temp. Hardw. 261	458
Cleveland's Estate, Re, (1895) 2 Ch. 542 ; 65 L. J. Ch. 29 ; 73 L. T. 313	126
Clinan v. Cooke, 1 Sch. & Lef. 22 ; 9 R. R. 3	455, 458
Clive v. Beaumont, 1 De G. & S. 397 ; 13 Jur. 226.	273
Clowes v. Higginson, 1 Ves. & B. 524 ; 12 R. R. 284	144
Cohen v. Mitchell, 25 Q. B. D. 262 ; 59 L. J. Q. B. 409 ; 63 L. T. 206 ; 38 W. R. 551	206
Colby v. Gadsden, 34 Beav. 416 ; 12 L. T. 197 ; 11 Jur. n.s. 760 ; 5 N. R. 456 ; 15 W. R. 1185	71
Cole v. White, mentioned in argument, 1 Bro. C. C. 409	457
Colegrave v. Dias Santos, 2 B. & C. 76 ; 3 D. & R. 255 ; 1 L. J. K. B. 239	175, 177
Coleman v. Coleman, 79 L. T. 66	261
Coles v. Trecothick, 9 Ves. 234 ; 1 Sim. 233 ; 7 R. R. 167	448
Collard v. Roe, 4 De G. & J. 525 ; 28 L. J. Ch. 560 ; 7 W. R. 623 ; 4 Jur. n.s. 431	379
Collard v. Sampson, 4 D. M. & G. 224	205, 208
Collen v. Wright, 8 E. & B. 647 ; 27 L. J. Q. B. 215 ; 30 L. T. o.s. 209 ; 4 Jur. n.s. 357 ; 6 W. R. 123.	65, 132
Collier v. Jenkins, You. 295 ; 34 R. R. 268	84
Collier v. McBean, 1 Ch. 81 ; 35 L. J. Ch. 144 ; 13 L. T. 484 ; 12 Jur. 1 ; 14 W. R. 156	204
Collier v. Mason, 25 Beav. 200	179
Collier v. Walters, 17 Eq. 252 ; 43 L. J. Ch. 216 ; 29 L. T. 868 ; 22 W. R. 209	203, 204
Collins v. Collins, 26 Beav. 306 ; 28 L. J. Ch. 184 ; 32 L. T. o.s. 233 ; 5 Jur. n.s. 30 ; 7 W. R. 115	180
Collins v. Stimson, 11 Q. B. D. 142 ; 52 L. J. Q. B. 440 ; 48 L. T. 823 ; 31 W. R. 920	416
Colyer v. Clay, 7 Beav. 188	58
Commings v. Scott, 20 Eq. 11 ; 44 L. J. Ch. 563 ; 32 L. T. 420 ; 23 W. R. 498	452
Compton v. Bagley, (1892) 1 Ch. 313 ; 61 L. J. Ch. 113 ; 65 L. T. 706	264, 305, 306
Connolly v. Parsons, 3 Ves. 625 n.	168
Conservative Bldg. Soc., Re (not reported)	413
Cook v. Andrews, (1897) 1 Ch. 266 ; 66 L. J. Ch. 137 ; 76 L. T. 16	353
Cook v. Dawson, 3 D. F. & J. 127 ; 30 L. J. Ch. 311 ; 3 L. T. 801 ; 7 Jur. n.s. 130 ; 9 W. R. 305	204, 206

	PAGE
<i>Cook v. Waugh</i> , 2 Giff. 201 ; 2 L. T. 346 ; 6 Jur. n.s. 596 ; 8 W. R. 458	24, 34
<i>Cooke and Holland</i> , 78 L. T. 106	311
<i>Cooke v. Tombs</i> , 2 Anst. 420	458
<i>Coombs v. Cook</i> , 1 Cab. & Ell. 75	1
<i>Coombs v. Wilkes</i> , (1891) 3 Ch. 77 ; 61 L. J. Ch. 42 ; 65 L. T. 56 ; 40 W. R. 77	451
<i>Cooper and Allen</i> , 4 Ch. D. 802 ; 46 L. J. Ch. 133 ; 35 L. T. 890 ; 25 W. R. 301	113, 208, 431, 432
<i>Cooper and Crondace</i> , 90 L. T. 258 ; 52 W. R. 441	391
<i>Cooper v. Cartwright, Johns</i> . 679	377
<i>Cooper v. Emery</i> , 10 Sim. 609 ; 1 Ph. 388 ; 13 L. J. Ch. 275 ; 2 L. T. o.s. 437 ; 8 Jur. 181	405, 406
<i>Cooper v. Kynock</i> , 7 Ch. 398 ; 41 L. J. Ch. 296 ; 26 L. T. 566 ; 20 W. R. 503	204
<i>Cooper v. Phibbs</i> , L. R. 2 H. L. 149 ; 16 L. T. 678 ; 15 W. R. 1049	58, 59
<i>Cooper v. Trewby</i> , 28 Beav. 194 ; 8 W. R. 299	37
<i>Cooth v. Jackson</i> , 6 Ves. 12 ; 10 R. R. 190	180
<i>Copper Mining Co. v. Beach</i> , 13 Beav. 478	389
<i>Corder v. Morgan</i> , 18 Ves. 344	379
<i>Cordingley v. Cheeseborough</i> , 4 D. F. & J. 379 ; 31 L. J. Ch. 617 ; 6 L. T. 342 ; 8 Jur. n.s. 585, 755	361
<i>Cornfoot v. Fowke</i> , 6 M. & W. 358 ; 9 L. J. Ex. 297 ; 4 Jur. 919	32, 64
<i>Cornwall v. Henson</i> , (1900) 2 Ch. 298 ; 69 L. J. Ch. 581 ; 82 L. T. 735 ; 49 W. R. 42	310, 315, 417, 421
<i>Corrall v. Cattell</i> , 4 M. & W. 734	233
<i>Coslake v. Till</i> , 1 Russ. 376 ; 25 R. R. 75	203
<i>Cosser v. Collinge</i> , 3 M. & K. 283 ; 1 L. J. Ch. 130 ; 41 R. R. 70	249
<i>Cotton v. Sendamore</i> , 1 K. & J. 321	414
<i>Cottrell v. Cottrell</i> , 2 Eq. 330 ; 35 L. J. Ch. 466 ; 14 L. T. 220 ; 12 Jur. n.s. 285 ; 14 W. R. 572	384
<i>Coverley v. Burrell</i> , 5 B. & Ald. 257 ; 24 R. R. 350	39
<i>Cowles v. Gale</i> , 7 Ch. 12 ; 41 L. J. Ch. 14 ; 25 L. T. 524 ; 20 W. R. 70	303
<i>Cowley v. Watts</i> , 21 L. T. o.s. 97 ; 22 L. J. Ch. 591 ; 17 Jur. 172 ; 1 W. R. 218	68, 141, 212
<i>Cowper v. Harmer</i> , 1887, W. N. 186	385
<i>Cox and Neve</i> , (1891) 2 Ch. 109 ; 64 L. T. 733 ; 39 W. R. 412	92, 219, 242, 244, 269
<i>Cox v. Coventon</i> , 31 Beav. 378 ; 7 L. T. 78 ; 8 Jur. n.s. 1142 ; 10 W. R. 829	1, 84, 107, 121, 246, 247
<i>Cox v. Middleton</i> , 2 Drew. 209 ; 2 Eq. Rep. 631 ; 23 L. J. Ch. 618 ; 23 L. T. o.s. 6 ; 2 W. R. 284	16, 24, 25
<i>Craddock v. Piper</i> , 14 Sim. 310 ; 15 L. T. o.s. 61 ; 14 Jur. 97	256
<i>Crane v. Kilpin</i> , 6 Eq. 334 ; 37 L. J. Ch. 913 ; 19 L. T. 350	333
<i>Crawford v. Toogood</i> , 13 Ch. D. 153 ; 49 L. J. Ch. 108 ; 41 L. T. 549 ; 28 W. R. 248	305, 306
<i>Cresswell v. Davidson</i> , 56 L. T. 811	83
<i>Cripps v. Reade</i> , 6 T. R. 606 ; 3 R. R. 273	152
<i>Crockford v. Alexander</i> , 15 Ves. 138 ; 10 R. R. 44	334, 353

	PAGE
Crompton <i>v.</i> Melbourne, 5 Sim. 353	105, 153
Croome <i>v.</i> Lediard, 2 My. & K. 251 ; 3 L. J. Ch. 98 ; 39 R. R. 195	143
Crosse <i>v.</i> Keene, 9 Ha. 469	175
Crosse <i>v.</i> Lawrence, 9 Ha. 462 ; 16 Jur. 142 ; 21 L. J. Ch. 889	175, 253
Crowder <i>v.</i> Austin, 3 Bing. 368 ; 11 Moore, 283 ; 2 C. & P. 208 ; 4 L. J. o.s. C. P. 118 ; 28 R. R. 646	168
Cruse <i>v.</i> Nowell, 25 L. J. Ch. 709 ; 27 L. T. 313 ; 4 W. R. 619 ; 2 Jur. N.S. 536	228, 233
Crutehley <i>v.</i> Jerningham, 2 Mer. 502.	419
Cuddon <i>v.</i> Tite, 1 Giff. 395 ; 31 L. T. o.s. 340 ; 4 Jur. N.S. 579 ; 6 W. R. 606	338
Cumming to Godbolt, 1 Times L. R. 21 ; 1884, W. N. 204	229
Curling <i>v.</i> Austin, 2 Dr. & Sm. 129 ; 10 W. R. 682.	33, 185, 252
Cuthbert <i>v.</i> Baker, Sug. 313	93
Cutts, Ex parte, 3 Deac. 242 ; 3 M. & A. 549	446
Cutts <i>v.</i> Thodey, 13 Sim. 206 ; 1 Coll. 223 ; 6 Jur. 1027	273

D

Dagenham &c. Co., Re., 8 Ch. 1022 ; 43 L. J. Ch. 261	316
Dakin <i>v.</i> Cope, 2 Russ. 170 ; 26 R. R. 37	342, 344
Dalby <i>v.</i> Pullen, 3 Sim. 29 ; 1 Russ. & My. 296 ; 8 L. J. o.s. Ch. 74 ; 30 R. R. 123	85, 86, 152
Dale <i>v.</i> Hamilton, 5 Ha. 369 ; 2 Ph. 266 ; 16 L. J. Ch. 397 ; 9 L. T. o.s. 309 ; 11 Jur. 574	457
Dale <i>v.</i> Lister, cited 16 Ves. 7	112, 114
Dames and Wood, 29 Ch. D. 626 ; 54 L. J. Ch. 771 ; 53 L. T. 177 ; 33 W. R. 685	366, 368, 370
Dance <i>v.</i> Goldingham, 8 Ch. 902 ; 42 L. J. Ch. 777 ; 29 L. T. 166 ; 21 W. R. 761	433, 435
Daniel <i>v.</i> Anderson, 31 L. J. Ch. 610 ; 7 L. T. 183 ; 8 Jur. N.S. 328 ; 10 W. R. 366	436
Daniels <i>v.</i> Davison, 17 Ves. 433 ; 10 R. R. 171	374
Darby <i>v.</i> Whitaker, 4 Drew. 134 ; 29 L. T. o.s. 351 ; 5 W. R. 772	181, 182
Dare <i>v.</i> Tucker, 6 Ves. 460	405, 430
Darlington <i>v.</i> Hamilton, Kay, 550 ; 2 Eq. Rep. 906 ; 23 L. J. Ch. 1000	74, 83, 217, 247
Dashwood <i>v.</i> Magniae, (1891) 3 Ch. 306 ; 60 L. J. Ch. 809 ; 65 L. T. 811	175
Davenport <i>v.</i> Charsley, 54 L. T. 372 ; 34 W. R. 390	35
Davey <i>v.</i> Durrant, 1 De G. & J. 535 ; 26 L. J. Ch. 830	441
Davies <i>v.</i> Sear, 7 Eq. 427 ; 38 L. J. Ch. 535 ; 20 L. T. 56 ; 17 W. R. 390	44
Davis and Cavey, 40 Ch. D. 601 ; 58 L. J. Ch. 143 ; 60 L. T. 100 ; 37 W. R. 217	26, 128, 138, 288
Davis <i>v.</i> Jones, 2 B. & Ald. 165 ; 20 R. R. 396	178
Davys to Saurin, 17 L. R. Ir. 334	216, 218
Dawes <i>v.</i> Betts, 12 Jur. 709 ; 17 L. J. Ch. 315	13, 246
Dawes <i>v.</i> Charsley, 1886, W. N. 78	302
Dawes <i>v.</i> King, 1 Stark. 75	17

	PAGE
Dawson, Re, 21 L. R. Ir. 441	338
Dawson v. Brinckman, 3 Mac. & G. 53	254, 273, 276
Dawson v. Yates, 1 Beav. 301 ; 2 Jur. 960	370
Day v. Luhke, 5 Eq. 336 ; 37 L. J. Ch. 330 ; 16 W. R. 717	303, 397
Day v. Singleton, (1899) 2 Ch. 320 ; 68 L. J. Ch. 593 ; 81 L. T. 306 ; 48 W. R. 18	130, 131, 398
Day v. Wells, 30 Beav. 220 ; 7 Jur. n.s. 1004 ; 9 W. R. 857	56, 447
Debenham v. Sawbridge, (1901) 2 Ch. 98 ; 70 L. J. Ch. 525 ; 84 L. T. 519 ; 49 W. R. 502	58, 59, 282
De Falbe, Re. See Leigh v. Taylor.	
Deighton and Harris, (1898) 1 Ch. 458 ; 67 L. J. Ch. 240 ; 78 L. T. 430 ; 46 W. R. 341	271, 359, 360
De Lassalle v. Guildford, (1901) 2 K. B. 215 ; 70 L. J. K. B. 533 ; 84 L. T. 549 ; 49 W. R. 467	10, 146, 154, 155
Deller v. Simmonds, 5 Jur. n.s. 997	274
Delves v. Gray, (1902) 2 Ch. 606 ; 71 L. J. Ch. 808 ; 87 L. T. 425 ; 51 W. R. 56	378
Denne v. Light, 8 D. M. & G. 774 ; 26 L. J. Ch. 459 ; 29 L. T. o.s. 60 ; 3 Jur. n.s. 627 ; 5 W. R. 430	33, 185
Denning v. Henderson, 1 De G. & S. 689 ; 17 L. J. Ch. 8 ; 10 L. T. o.s. 302 ; 12 Jur. 89 ; 75 R. R. 249	318
Denny v. Hancock, 6 Ch. 1 ; 40 L. J. Ch. 193 ; 23 L. T. 686 ; 19 W. R. 54	3, 44, 76, 77
Depree v. Bidborough, 4 Giff. 479 ; 3 N. R. 187 ; 33 L. J. Ch. 134 ; 9 L. T. 532 ; 9 Jur. n.s. 1317 ; 12 W. R. 191	419
Deptford Creek, &c. and Beavan, 28 Sol. J. 327	87, 287
Derry v. Peak, 14 App. Ca. 337 ; 58 L. J. Ch. 864 ; 61 L. T. 265 ; 38 W. R. 33	20, 61, 72
De Visme v. De Visme, 1 Mac. & G. 336 ; 1 Hall & Tw. 408 ; 19 L. J. Ch. 52 ; 14 L. T. o.s. 169 ; 13 Jur. 1037 ; 84 R. R. 83	319, 320, 329, 331, 332, 339, 343
D'Eyncourt v. Gregory, 3 Eq. 382 ; 36 L. J. Ch. 107 ; 15 W. R. 186	177, 178
Dicconson v. Talbot, 6 Ch. 32 ; 24 L. T. 49 ; 19 W. R. 138	199
Dick v. Donald, 1 Bl. n.s. 655	224
Dicker v. Jackson, 6 C. B. 103 ; 17 L. J. C. P. 234 ; 12 Jur. 541	314
Dickinson v. Barrow, (1904) 2 Ch. 339 ; 73 L. J. Ch. 701 ; 91 L. T. 161	457
Dickinson v. Heron, Sug. 630 n.	333
Dimmock v. Hallett, 2 Ch. 21 ; 36 L. J. Ch. 146 ; 15 L. T. 374 ; 15 W. R. 93	6, 15, 93, 158, 166, 280, 287
Dixon v. Gayfere, 1 De G. & J. 655 ; 27 L. J. Ch. 148 ; 30 L. T. o.s. 162 ; 3 Jur. n.s. 1157 ; 6 W. R. 52	393
Dobell v. Hutchinson, 3 Ad. & E. 355 ; 5 N. & M. 251 ; 1 H. & W. 394 ; 4 L. J. Q. B. 201 ; 42 R. R. 408	87, 290
Dodson v. Downey, (1901) 2 Ch. 620 ; 70 L. J. Ch. 854 ; 85 L. T. 273 ; 50 W. R. 57	390
Doe d. Tunstill v. Bottrill, 5 B. & Ad. 131 ; 2 L. J. K. B. 158 ; 39 R. R. 432	238
Doherty, Re, 15 L. R. Ir. 247	395, 430
Donald v. Scott, 10 Ir. Ch. R. 496	145
Donovan v. Fricker, Jac. 165	352, 353

	PAGE
Douglas and Powell, (1902) 2 Ch. 296 ; 71 L. J. Ch. 850	192, 199
Douglass <i>v.</i> L. & N. W. Rail. Co., 3 K. & Jo. 173 ; 3 Jur. N.S. 181	238
Dowson <i>v.</i> Solomon, 1 Dr. & S. 1 ; 29 L. J. Ch. 129 ; 1 L. T. 246 ; 8 W. R. 123 ; 6 Jur. N.S. 33	344, 350
D'Oyley <i>v.</i> Powis, 1 Cox. 206 ; 2 Bro. C. C. 32	127
Drewe <i>v.</i> Corp, 9 Ves. 368	82
Drewe <i>v.</i> Hanson, 6 Ves. 675 ; 17 R. R. 46 n.	88, 90
Dreyfus <i>v.</i> Peruvian Guano Co., 42 Ch. D. 66 ; 58 L. J. Ch. 758 ; 61 L. T. 180	352
Drysdale <i>v.</i> Mace, 5 D. M. & G. 103 ; 23 L. J. Ch. 518 ; 2 Eq. Rep. 386 ; 2 W. R. 341	233
Duddell <i>v.</i> Simpson, 2 Ch. 102 ; 36 L. J. Ch. 70 ; 15 L. T. 305 ; 15 W. R. 115	359, 365, 369, 370, 371, 372, 373
Duke <i>v.</i> Barnett, 2 Coll. 337 ; 15 L. J. Ch. 173 ; 6 L. T. o.s. 478 ; 10 Jur. 87 ; 70 R. R. 246	220, 257
Dunn <i>v.</i> Flood, 28 Ch. D. 586 ; 54 L. J. Ch. 370 ; 52 L. T. 699 ; 33 W. R. 315	37, 106, 433, 434, 435, 436, 437
Durham <i>v.</i> Legard, 34 Beav. 611 ; 34 L. J. Ch. 589 ; 13 L. T. 82 ; 11 Jur. N.S. 706 ; 13 W. R. 959	56, 57, 101
Duthy and Jesson, (1898) 1 Ch. 419 ; 67 L. J. Ch. 218 ; 78 L. T. 223 ; 46 W. R. 300	221, 403, 404, 409
Dyas <i>v.</i> Stafford, 9 L. R. Ir. 520	447, 449
Dyer <i>v.</i> Hargrave, 10 Ves. 505 ; 8 R. R. 36	15, 25, 69, 79, 89 99, 304, 342
Dykes <i>v.</i> Blake, 4 Bing. N. C. 463 ; 6 Sc. 320 ; 1 Arn. 209 ; 7 L. J. C. P. 282 ; 44 R. R. 761	10, 25, 44, 88, 92, 289, 290, 425
Dyson <i>v.</i> Hornby, 4 De G. & S. 481	329

E

Eaglesfield <i>v.</i> Londonderry, 4 Ch. D. 693 ; 38 L. T. 303 ; 26 W. R. 540	19
Ebsworth and Tidy, 42 Ch. D. 23 ; 58 L. J. Ch. 665 ; 60 L. T. 841 ; 37 W. R. 657	36, 74, 75, 128, 265, 410, 426
Edgell <i>v.</i> Day, L. R. 1 C. P. 80 ; 35 L. J. C. P. 7 ; 1 H. & Ruth. 8 ; 13 L. T. 328 ; 12 Jur. 27 ; 14 W. R. 87	173
Edgington <i>v.</i> Fitzmaurice, 29 Ch. D. 459 ; 55 L. J. Ch. 650 ; 53 L. T. 369 ; 32 W. R. 848	22, 72
Eddie and Brown, 58 L. T. 307	339
Edmonds <i>v.</i> Peake, 7 Beav. 239 ; 13 L. J. Ch. 13	433
Edwards to Daniel Sykes &c., 62 L. T. 445	145, 149
Edwards <i>v.</i> Hodding, 5 Taunt. 815 ; 1 Marsh. 377 ; 15 R. R. 662	172
Edwards <i>v.</i> McLeay, G. Coop. 308 ; 2 Swa. 287 ; 14 R. R. 261	63, 155, 353
Edwards <i>v.</i> Wickwar, 1 Eq. 68 ; 35 L. J. Ch. 48 ; 13 L. T. 428 ; 14 W. R. 79	50, 220, 231
Edwards-Wood <i>v.</i> Marjoribanks, 7 H. L. Ca. 806 ; 30 L. J. Ch. 176 ; 3 L. T. 222 ; 6 Jur. N.S. 1167	36
Egg <i>v.</i> Blayney, 21 Q. B. D. 107 ; 57 L. J. Q. B. 460 ; 59 L. T. 65 ; 36 W. R. 893	346
Egmont <i>v.</i> Smith, 6 Ch. D. 469 ; 46 L. J. Ch. 356	340, 377

	PAGE
Ellard <i>v.</i> Llandaff, 1 B. & B. 241 ; 12 R. R. 22	33
Ellis <i>v.</i> Goulton, (1893) 1 Q. B. 350 ; 62 L. J. Q. B. 232 ; 68 L. T. 144 ; 41 W. R. 411	173
Ellis <i>v.</i> Rogers, 29 Ch. D. 661 ; 53 L. T. 377	50, 67, 142, 184, 211, 212, 310, 311, 312
Else <i>v.</i> Else, 13 Eq. 196 ; 41 L. J. Ch. 213 ; 25 L. T. 927 ; 20 W. R. 286	222, 223, 256, 443
Elworthy <i>v.</i> Sandford, 3 H. & C. 330 ; 34 L. J. Ex. 42 ; 10 L. T. 654 ; 12 W. R. 1008	400
Emery <i>v.</i> Groeock, 6 Mad. 54 ; 22 R. R. 236	194, 195
Emmerson <i>v.</i> Heelis, 2 Taunt. 38 ; 11 R. R. 520	448, 456
Engell <i>v.</i> Fitch, L. R. 4 Q. B. 659 ; 38 L. J. Q. B. 304 ; 18 L. T. 318 ; 17 W. R. 894	131, 133, 361
English <i>v.</i> Murray, 49 L. T. 35 ; 32 W. R. 84	108, 221
Eno <i>v.</i> Eno, 6 Ha. 171 ; 16 L. J. Ch. 358 ; 11 Jur. 746	206
Enraght <i>v.</i> Fitzgerald, 2 Dr. & War. 43	327
Erskine <i>v.</i> Adeane, 8 Ch. 756 ; 42 L. J. Ch. 835 ; 29 L. T. 324 ; 21 W. R. 802	146
Esdaile <i>v.</i> Stephenson, 1 S. & St. 122 ; 24 R. R. 151	91, 317, 323
Essex <i>v.</i> Daniell, L. R. 10 C. P. 538 ; 32 L. T. 476	419, 421
Evanee <i>v.</i> Hogg, Seton, 1314	81, 86
Evans <i>v.</i> Robins, 1 H. & C. 302 ; 31 L. J. Ex. 465 ; 6 L. T. 897 ; 10 W. R. 776	183, 291
Evershed and Campion (not reported)	5, 89, 296

F

Faine <i>v.</i> Brown, cited 2 Ves. sen. 307	98
Fairhead <i>v.</i> Southee, 11 W. R. 739 ; 9 Jur. n.s. 764	54
Falkner <i>v.</i> Eq. Rev. Soc., 4 Drew. 352 ; 28 L. J. Ch. 132 ; 32 L. T. o.s. 181 ; 4 Jur. n.s. 1214 ; 7 W. R. 73	434, 438, 440
Farebrother <i>v.</i> Gibson, 1 De G. & J. 602	140
Farebrother <i>v.</i> Prattent, 5 Pri. 303	174
Farebrother <i>v.</i> Simmons, 5 B. & Ald. 333 ; 24 R. R. 399	448
Farnham, &c. <i>v.</i> Hunt, 68 L. T. 440	303
Farrar <i>v.</i> Farrars, Lim., 40 Ch. D. 395 ; 58 L. J. Ch. 185 ; 60 L. T. 121 ; 37 W. R. 196	440
Farrer <i>v.</i> Lacy, &c., 31 Ch. D. 42 ; 55 L. J. Ch. 149 ; 53 L. T. 515 ; 34 W. R. 22	172, 441
Fawcett and Holmes, 42 Ch. D. 150 ; 58 L. J. Ch. 763 ; 61 L. T. 105	86, 107, 281, 287, 288, 289
Fellowes <i>v.</i> Gwydyr, 1 Russ. & My. 83 ; 32 R. R. 148	76
Fennelly <i>v.</i> Anderson, 1 Ir. Ch. R. 706	220
Fenton <i>v.</i> Browne, 14 Ves. 144 ; 9 R. R. 255	18
Ferguson <i>v.</i> Tadman, 1 Sim. 530 ; 27 R. R. 236	350
Ferguson <i>v.</i> Wilson, 2 Ch. 77 ; 15 W. R. 27	137
Fewster <i>v.</i> Turner, 11 L. J. Ch. 161 ; 6 Jur. 144	46
Filby <i>v.</i> Hounsell, (1896) 2 Ch. 737 ; 65 L. J. Ch. 852 ; 75 L. T. 270 ; 45 W. R. 232	450, 451
Fildes <i>v.</i> Hooker, 3 Mad. 193 ; 18 R. R. 214	83, 125

	PAGE
<i>Fletcher v. Lane. & Y. Ry.</i> , (1902) 1 Ch. 901 ; 71 L. J. Ch. 590 ; 50 W. R. 423	326
<i>Flight v. Barton</i> , 3 My. & K. 282	13
<i>Flight v. Booth</i> , 1 Bing. N. C. 370 ; 1 Scott, 190 ; 4 L. J. C. P. 66 ; 41 R. R. 599	12, 39, 78, 92, 159, 288, 289, 291
<i>Flint v. Woodin</i> , 9 Ha. 618 ; 22 L. J. Ch. 92 ; 16 Jur. 719	5, 168
<i>Flood v. Pritchard</i> , 40 L. T. 873	68, 453
<i>Flower v. Hartopp</i> , 6 Beav. 476 ; 12 L. J. Ch. 507 ; 7 Jur. 613	234, 252
<i>Flureau v. Thornhill</i> , 2 W. Bl. 1078	130, 132, 135
<i>Fordyce v. Ford</i> , 4 Bro. C. C. 494	6
<i>Forrer v. Nash</i> , 35 Beav. 167 ; 11 Jur. N.S. 789 ; 14 W. R. 8	85, 311
<i>Forster v. Hoggart</i> , 15 Q. B. 155 ; 19 L. J. Q. B. 340 ; 14 Jur. 767 ; 81 R. R. 288	313, 314
<i>Forteblow v. Shirley</i> , cited in 2 Sw. 223. And see <i>Horniblow v.</i> <i>Shirley</i>	39
<i>Foster and Lister</i> , 6 Ch. D. 87 ; 46 L. J. Ch. 480 ; 36 L. T. 582 ; 25 W. R. 553	262
<i>Foster v. Deacon</i> , 3 Mad. 394 ; 18 R. R. 251	350, 351
<i>Foster v. Leonard</i> , Cro. Eliz. 1	175
<i>Freeland v. Pearson</i> , 7 Eq. 246	256, 257
<i>Freer v. Hesse</i> , 4 D. M. & G. 495 ; 22 L. J. Ch. 597 ; 2 Eq. R. 13 ; 1 W. R. 242, 499	193
<i>Freer v. Rimmer</i> , 14 Sim. 391	171
<i>Fremer's Contract, Re</i> , (1895) 2 Ch. 256 (aff. 778) ; 64 L. J. Ch. 534. 862 ; 72 L. T. 486 ; 73 <i>ib.</i> 366 ; 44 W. R. 164	96
<i>Fremer v. Wright</i> , 4 Mad. 364 ; 20 R. R. 313	220
<i>Frend v. Buckley</i> , L. R. 5 Q. B. 213 ; 39 L. J. Q. B. 90 ; 23 L. T. 170 ; 18 W. R. 680 ; 10 B. & S. 973	238
<i>Frost v. Brewer</i> , 3 Jur. 165	297
<i>Frühling v. Schroeder</i> , 2 Bing. N. C. 77	129
<i>Fuller v. Wilson</i> . See <i>Wilson v. Fuller</i> .	
<i>Furtado v. Lumley</i> , 6 Times L. R. 168	172

G

<i>Gabriel v. Smith</i> , 16 Q. B. 847 ; 20 L. J. Q. B. 386 ; 17 L. T. o.s. 61 ; 15 Jur. 1124 ; 83 R. R. 746	407
<i>Gale v. Squier</i> , 5 Ch. D. 625 ; 46 L. J. Ch. 373, 672 ; 36 L. T. 632 ; 25 W. R. 226	384
<i>Games v. Bonnor</i> , 54 L. J. Ch. 517 ; 33 W. R. 64	194
<i>Gardiner v. Tate, Jr.</i> , 10 C. L. 460.	42
<i>Gardom v. Lee</i> , 3 H. & C. 651 ; 34 L. J. Ex. 113 ; 12 L. T. 430 ; 13 W. R. 719 ; 11 Jur. N.S. 393	371
<i>Gas Light, &c. v. Towse</i> , 35 Ch. D. 519 ; 56 L. J. Ch. 889 ; 56 L. T. 602	130
<i>Gebhardt v. Saunders</i> , (1892) 2 Q. B. 452 ; 67 L. T. 684 ; 40 W. R. 571	<i>Add.</i>
<i>Gedye v. Montrose</i> , 26 Beav. 45	336
<i>General Finance, &c. v. Liberator, &c.</i> , 10 Ch. D. 15 ; 39 L. T. 600 ; 27 W. R. 210	386
<i>Geohagan v. Connolly</i> , 8 Ir. Ch. R. 598	217

	PAGE
George <i>v.</i> Thomas, 90 L. T. 505 ; 52 W. R. 416	190
Gerard and Beecham, (1894) 3 Ch. 295 ; 63 L. J. Ch. 695 ; 71 L. T. 272 ; 42 W. R. 678	2
Gerhard <i>v.</i> Bates, 2 El. & B. 476 ; 20 L. J. Q. B. 364 ; 1 W. R. 383 ; 17 Jur. 1097 ; 1 Com. L. R. 868	9, 18
Gibbs <i>v.</i> David, 20 Eq. 373 ; 44 L. J. Ch. 770 ; 33 L. T. 298 ; 23 W. R. 786	353
Gibson <i>v.</i> D'Este, 2 Y. & C. C. C. 542 ; 2 L. T. o.s. 186 ; 8 Jur. 94	155
Gibson <i>v.</i> Spurrier, Peake, Add. Cas. 49 ; 4 R. R. 887	91, 186
Gibson <i>v.</i> Woollard, 5 D. M. & G. 835 ; 24 L. J. Ch. 56 ; 24 L. T. o.s. 137 ; 3 W. R. 94 ; 3 Eq. R. 152	442
Gilliatt <i>v.</i> Gilliatt, 9 Eq. 60 ; 39 L. J. Ch. 142 ; 21 L. T. 522 ; 18 W. R. 203	165
Girling <i>v.</i> Girling, 1886, W. N. 18	228, 261
Glengal <i>v.</i> Barnard, 1 Keen, 769 ; 6 L. J. Ch. 25	448
Glenton <i>to</i> Haden, 53 L. T. 434	266, 365, 370
Gloag and Miller, 23 Ch. D. 320 ; 15 L. J. Ch. 654 ; 48 L. T. 629 ; 31 W. R. 601	213, 275, 278
Goddard <i>v.</i> Jeffreys, 51 L. J. Ch. 57 ; 45 L. T. 674 ; 30 W. R. 269	8, 53, 73
Godwin <i>v.</i> Francis, L. R. 5 C. P. 295 ; 39 L. J. C. P. 121 ; 22 L. T. 338	133, 134, 447
Golds and Norton, 52 L. T. 321 ; 33 W. R. 333	330, 331
Goodenough, Re, (1895) 2 Ch. 537 ; 65 L. J. Ch. 71 ; 73 L. T. 152 ; 44 W. R. 44	126
Goold <i>v.</i> Birmingham Bank, 58 L. T. 560	221
Goold <i>v.</i> White, Kay, 683 ; 24 L. T. o.s. 43 ; 2 Eq. R. 110	255
Gordon <i>v.</i> Lee. <i>See</i> Gardom <i>v.</i> Lee.	
Gordon <i>v.</i> Mahony, 13 Ir. Eq. R. 383	213
Gorely, Ex parte, 4 D. J. & S. 477 ; 34 L. J. Bk. 1 ; 11 L. T. 317 ; 10 Jur. n.s. 1085 ; 13 W. R. 60	349
Gosbell <i>v.</i> Archer, 2 Ad. & E. 500 ; 4 N. & M. 485 ; 1 H. & W. 31 ; 4 L. J. K. B. 78 ; 41 R. R. 475	459
Gosling <i>v.</i> Woolf, (1893) 1 Q. B. 39 ; 68 L. T. 89 ; 41 W. R. 106	239
Goslings <i>v.</i> Blake, 23 Q. B. D. 324 ; 58 L. J. Q. B. 446 ; 61 L. T. 311 ; 37 W. R. 774	333
Goss <i>v.</i> Nugent, 5 B. & Ad. 58 ; 2 N. & M. 28 ; 2 L. J. K. B. 127 ; 39 R. R. 392	151
Graham <i>v.</i> Oliver, 3 Beav. 124	107
Granger <i>v.</i> Worms, 4 Camp. 83	32
Grant <i>v.</i> Munt, G. Coop. 173 ; 14 R. R. 231	25, 89
Gray and Metr. Ry. Co., 44 L. T. 567	392
Gray <i>v.</i> Fowler, L. R. 8 Ex. 249 ; 42 L. J. Ex. 161 ; 29 L. T. 297 ; 21 W. R. 916	136, 267, 268, 356, 359, 371, 372
Gray <i>v.</i> Smith, 43 Ch. D. 208 ; 59 L. J. Ch. 145 ; 62 L. T. 335 ; 38 W. R. 310	454
Great Northern Ry. Co. and Sanderson, 25 Ch. D. 788 ; 53 L. J. Ch. 445 ; 50 L. T. 87 ; 32 W. R. 519	96, 102, 367
Greaves <i>v.</i> Wilson, 25 Beav. 290 ; 27 L. J. Ch. 546 ; 31 L. T. 68 ; 4 Jur. n.s. 271 ; 6 W. R. 482	160, 366, 370
Green <i>v.</i> Pulsford, 2 Beav. 70 ; 50 R. R. 102	191, 200
Green <i>v.</i> Sevin, 13 Ch. D. 589 ; 49 L. J. Ch. 166 ; 41 L. T. 724	305, 307

	PAGE
Greenhalgh <i>v.</i> Brindley, (1901) 2 Ch. 324 ; 70 L. J. Ch. 740 ; 84 L. T. 763 ; 49 W. R. 597	34
Greenwood <i>v.</i> Churchill, 8 Beav. 413 ; 14 L. J. Ch. 143 ; 4 L. T. o.s. 135 ; 9 Jur. 196 ; 68 R. R. 130	317
Greenwood <i>v.</i> Turner, (1891) 2 Ch. 144 ; 60 L. J. Ch. 351 ; 64 L. T. 261 ; 39 W. R. 315	336
Gregory <i>v.</i> Mighell, 18 Ves. 328 ; 11 R. R. 207	457
Greswolde-Williams <i>v.</i> Barnaby, 83 L. T. 708 ; 49 W. R. 203	154
Griffin <i>v.</i> Caddell, Ir. R. 9 C. L. 488	336
Griffith, &c. <i>v.</i> Humber, &c. <i>See</i> John Griffith, &c. <i>v.</i> Humber, &c.	
Griffiths <i>v.</i> Hatchard, 1 K. & J. 17 ; 23 L. J. Ch. 957 ; 23 L. T. o.s. 295 ; 18 Jur. 649 ; 2 W. R. 672	429
Griffiths <i>v.</i> Jones, 15 Eq. 279 ; 42 L. J. Ch. 468 ; 21 W. R. 470	55
Griffiths <i>v.</i> Vezey, (1906) 1 Ch. 796 ; 75 L. J. Ch. 462 ; 94 L. T. 574 ; 54 W. R. 490	424
Grissell <i>v.</i> Peto, 2 Sm. & G. 39 ; 18 Jur. 591 ; 2 W. R. 178	74, 120
Groom <i>v.</i> Booth, 1 Drew. 548 ; 22 L. J. Ch. 961 ; 21 L. T. o.s. 253 ; 17 Jur. 927 ; 1 W. R. 423	224, 438
Grosvenor <i>v.</i> Green, 28 L. J. Ch. 173 ; 32 L. T. o.s. 252 ; 5 Jur. n.s. 117 ; 1 W. R. 140	248, 249
Grove <i>v.</i> Bastard, 1 D. M. & G. 69 ; 17 L. J. Ch. 351 ; 12 Jur. 385	190
Groves <i>v.</i> Loomes, 53 L. T. 592 ; 55 L. J. Ch. 52 ; 34 W. R. 94	194
Guest and Worth, 1 Key & Elph. (6th ed.) 424 n.	405
Guest <i>v.</i> Homfray, 5 Ves. 818 ; 5 R. R. 176	264
Guinness, Ex parte, 5 L. R. Ir. 616	284
Gunnis <i>v.</i> Erhart, 1 H. Bl. 289 ; 2 R. R. 769	148
Guyton and Rosenberg, (1901) 2 Ch. 591 ; 70 L. J. Ch. 751 ; 85 L. T. 66 ; 50 W. R. 38	405
Gwillim <i>v.</i> Stone, 14 Ves. 128	136

H

Haedieke and Lipski, (1901) 2 Ch. 666 ; 70 L. J. Ch. 811 ; 85 L. T. 402 ; 50 W. R. 20	39, 226, 249
Haines <i>v.</i> Burnett, 27 Beav. 500 ; 29 L. J. Ch. 289 ; 1 L. T. 18 ; 5 Jur. n.s. 1279 ; 8 W. R. 130	29
Halifax, &c. and Wood, 79 L. T. 536 ; 47 W. R. 194	400
Hall's Estate, Re, 9 Eq. 179 ; 39 L. J. Ch. 392	114
Hall <i>v.</i> Ball, 3 M. & G. 242 ; 3 Scott N. R. 577 ; 10 L. J. Ch. 255	400
Hall <i>v.</i> Dewes, Jac. 189 ; 23 R. R. 27	203
Hall <i>v.</i> Laver, 3 Y. & C. 191	275
Hall <i>v.</i> Smith, 14 Ves. 426 ; 9 R. R. 313	247, 249
Hallows <i>v.</i> Fernie, 3 Ch. 467 ; 18 L. T. 340 ; 16 W. R. 873	42, 71
Halsey <i>v.</i> Grant, 13 Ves. 73 ; 9 R. R. 143	85, 87, 90, 91, 123, 125
Hamand <i>v.</i> Best. <i>See</i> Best <i>v.</i> Hamand.	
Hamilton <i>v.</i> Buckmaster, 3 Eq. 323 ; 36 L. J. Ch. 58 ; 15 L. T. 177 ; 15 W. R. 149	204, 205, 210
Hampshire <i>v.</i> Wickens, 7 Ch. D. 555 ; 47 L. J. Ch. 243 ; 38 L. T. 498 ; 26 W. R. 491	27, 28, 29
Hanbury <i>v.</i> Litchfield, 2 My. & K. 629 ; 3 L. J. Ch. 49 ; 39 R. R. 312	84, 112, 240

	PAGE
Handman and Wilcox, (1902) 1 Ch. 599 ; 71 L. J. Ch. 263 ; 86 L. T. 246	188, 193, 201, 204
Hanks v. Palling, 6 E. & B. 659 ; 25 L. J. Q. B. 375 ; 27 L. T. o.s. 170 ; 4 W. R. 607 ; 2 Jur. n.s. 688	237
Hanslip v. Padwick, 5 Ex. 615 ; 19 L. J. Ex. 372 ; 82 R. R. 784	135
Harding v. ———, 4 L. J. o.s. Ch. 213	402
Hardman v. Child, 28 Ch. D. 712 ; 54 L. J. Ch. 695 ; 52 L. T. 465 ; 33 W. R. 544	360
Hardwicke v. Sandys, 12 M. & W. 761 ; 13 L. J. Ex. 233 ; 3 L. T. o.s. 60	338
Hare and O'More, (1901) 1 Ch. 93 ; 70 L. J. Ch. 45 ; 83 L. T. 672 ; 49 W. R. 202	2, 147, 149
Hare v. Burges, 4 K. & J. 45 ; 27 L. J. Ch. 86 ; 30 L. T. 255 ; 3 Jur. n.s. 1294 ; 6 W. R. 144	389
Harford v. Purrier, 1 Mad. 532 ; 16 R. R. 260	340
Hargreaves and Thompson, 32 Ch. D. 454 ; 56 L. J. Ch. 199 ; 55 L. T. 239 ; 34 W. R. 708	126, 128, 138
Harington v. Hoggart, 1 B. & Ad. 577 ; 9 L. J. o.s. K. B. 14 ; 35 R. R. 382	172, 173
Harnett v. Baker, 20 Eq. 50 ; 45 L. J. Ch. 64 ; 32 L. T. 382 ; 23 W. R. 559	218, 222
Harnett v. Yeilding, 2 Sch. & L. 549 ; 9 R. R. 98	105
Harris v. Nickerson, L. R. 8 Q. B. 286 ; 42 L. J. Q. B. 171 ; 28 L. T. 414 ; 21 W. R. 635	171
Harry v. Davey, 2 Ch. D. 721 ; 45 L. J. Ch. 697 ; 34 L. T. 842 ; 24 W. R. 576	191
Hart v. Hart, 1 Ha. 1 ; 11 L. J. Ch. 9 ; 5 Jur. 1007	400, 401
Hart v. Swaine, 7 Ch. D. 42 ; 47 L. J. Ch. 5 ; 37 L. T. 376 ; 26 W. R. 30	61, 62, 82, 134, 153
Hartley v. Burton, 3 Ch. 365 ; 16 W. R. 876	381
Hartley v. Smith, Buck. 368	197
Harvey v. Harvey, 2 Str. 1141	178
Harvey v. Philips, 2 Atk. 541	400
Harvey v. Young, Yelv. 21	18
Hatten v. Russell, 38 Ch. D. 334 ; 57 L. J. Ch. 425 ; 58 L. T. 271 ; 36 W. R. 317	304, 313
Hawkins v. Holmes, 1 P. Wms. 770	458
Haydon v. Bell, 1 Beav. 337 ; 2 Jur. 1008	276
Hayford v. Criddle, 22 Beav. 477	36
Haywood v. Cope, 25 Beav. 140 ; 27 L. J. Ch. 468 ; 31 L. T. o.s. 48 ; 4 Jur. n.s. 227 ; 6 W. R. 304	34, 71
Haywood v. Silber, 30 Ch. D. 404 ; 54 L. T. 108 ; 34 W. R. 114, 395, 396	
Head's Trustees and Macdonald, 45 Ch. D. 310 ; 59 L. J. Ch. 604 ; 63 L. T. 21 ; 38 W. R. 657	313
Heath v. Crealock, 10 Ch. 22 ; 44 L. J. Ch. 157 ; 31 L. T. 650 ; 23 W. R. 95	386
Heath v. Heath, 1 Bro. C. C. 147	192
Heatley v. Newton, 19 Ch. D. 326 ; 51 L. J. Ch. 225 ; 45 L. T. 455 ; 30 W. R. 72	166
Heaysman and Tweedy, 69 L. T. 89	189, 265
Heffer v. Martyn, 36 L. J. Ch. 372 ; 15 W. R. 390	171
Henderson v. Barnewall, 1 Y. & J. 387 ; 30 R. R. 799	449

	PAGE
Henderson <i>v.</i> Hay, 3 Bro. C. C. 632	28
Henderson <i>v.</i> Hudson, 15 W. R. 860	68
Heppenstall <i>v.</i> Hose, 51 L. T. 589 ; 33 W. R. 30	270, 358, 359, 360
Hepworth <i>v.</i> Pickles, (1900) 1 Ch. 108 ; 69 L. J. Ch. 55 ; 81 L. T. 518 ; 48 W. R. 184	39, 193
Herbert <i>v.</i> Salisbury & Yeovil Rail. Co., 2 Eq. 221 ; 14 L. T. 507 ; 14 W. R. 706	328
Heseltine <i>v.</i> Simmons, 6 W. R. 268	191
Hetting and Merton, (1893) 3 Ch. 269 ; 62 L. J. Ch. 783 ; 69 L. T. 266 ; 42 W. R. 19	318, 320, 321, 322
Hexter <i>v.</i> Pearee, (1900) 1 Ch. 341 ; 69 L. J. Ch. 146 ; 82 L. T. 109 ; 48 W. R. 330	55, 100
Heywood <i>v.</i> Mallalieu, 25 Ch. D. 357 ; 53 L. J. Ch. 492 ; 49 L. T. 658 ; 32 W. R. 538	12, 92, 187, 191, 227, 296
Hickman <i>v.</i> Haynes, L. R. 10 C. P. 593 ; 44 L. J. C. P. 358 ; 32 L. T. 873 ; 23 W. R. 871	150
Hicks <i>v.</i> Phillips, Prec. in Ch. 575	82
Hickson <i>v.</i> Darlow, 23 Ch. D. 690 ; 52 L. J. Ch. 453 ; 48 L. T. 449 ; 31 W. R. 417	441
Higgins and Hitchman, 21 Ch. D. 95 ; 51 L. J. Ch. 772 ; 30 W. R. 700	74, 92, 431
Higgins and Percival, 59 L. T. 213 ; 57 L. J. Ch. 807	127, 128, 138, 260
Higgins <i>v.</i> Samels, 2 J. & H. 460 ; 7 L. T. 240	18, 71, 72
Higginson <i>v.</i> Clowes, 15 Ves. 516 ; 10 R. R. 112	139, 140, 157, 176, 425
Highett and Bird, (1903) 1 Ch. 287 ; 72 L. J. Ch. 220 ; 87 L. T. 697 ; 51 W. R. 227	211, 212, 258, 259
Highgate Archway Co. <i>v.</i> Jeakes, 12 Eq. 9 ; 40 L. J. Ch. 408 ; 24 L. T. 567 ; 19 W. R. 692	210
Hill <i>v.</i> Buckley, 17 Ves. 394 ; 11 R. R. 109	3, 4, 73, 86, 105, 108, 111
Hill <i>v.</i> Bullock, (1897) 2 Ch. 482 ; 66 L. J. Ch. 705 ; 77 L. T. 240 ; 46 W. R. 84	178
Hill <i>v.</i> Gray, 1 Stark. 434 ; 18 R. R. 802	14
Hinde <i>v.</i> Whitehouse, 7 East. 558 ; 3 Smith. 528 ; 8 R. R. 676	454
Hinton <i>v.</i> Sparkes, L. R. 3 C. P. 161 ; 37 L. J. C. P. 81 ; 17 L. T. 600 ; 16 W. R. 360	416, 419
Hipgrave <i>v.</i> Case, 28 Ch. D. 356 ; 54 L. J. Ch. 399 ; 52 L. T. 242	424
Hipwell <i>v.</i> Knight, 1 Y. & C. Ex. 401 ; 4 L. J. Ex. Eq. 52 ; 41 R. R. 304	264, 302, 308
Hitchcock <i>v.</i> Giddings, 4 Pri. 135 ; 18 R. R. 725	58
Hobson <i>v.</i> Bell, 2 Beav. 17 ; 8 L. J. Ch. 241 ; 3 Jur. 190	264, 268, 270, 438
Hobson <i>v.</i> Gorringe, (1897) 1 Ch. 182 ; 66 L. J. Ch. 114 ; 75 L. T. 610 ; 45 W. R. 356	178
Hodgens <i>v.</i> Keon, (1894) 2 Ir. R. 657	172
Hodges <i>v.</i> Blaggrave, 18 Beav. 404	389
Hodges <i>v.</i> Horsfall, 1 Russ. & My. 116 ; 32 R. R. 157	455, 456
Hodges <i>v.</i> Litchfield, 1 Bing. N. C. 492 ; 1 Sc. 449 ; 1 Hodges, 40 ; 41 R. R. 622	128, 135, 136
Hodgkinson <i>v.</i> Crowe, 19 Eq. 591 ; 10 Ch. 622 ; 44 L. J. Ch. 680 ; 33 L. T. 388 ; 23 W. R. 885	20

Hoggart <i>v.</i> Scott, 1 Russ. & My. 293 ; Tambl. 500 ; 9 L. J. o.s. Ch. 54 ; 31 R. R. 112	310, 312, 350
Holford <i>v.</i> Acton U. D. C., (1898) 2 Ch. 240 ; 67 L. J. Ch. 636 ; 78 L. T. 829	428
Hollis' Hospital and Hague, (1899) 2 Ch. 540 ; 68 L. J. Ch. 673 ; 81 L. T. 90 ; 47 W. R. 691	188, 189, 208
Holliwell <i>v.</i> Seacombe, (1906) 1 Ch. 426 ; 75 L. J. Ch. 289 ; 94 L. T. 186 ; 54 W. R. 355	131, 135, 356, 357, 363, 443, 444
Honywood <i>v.</i> Honywood, 18 Eq. 306 ; 43 L. J. Ch. 652 ; 30 L. T. 671 ; 22 W. R. 749	175
Hood <i>v.</i> Barrington, 6 Eq. 218	451
Hooper <i>v.</i> Smart, 18 Eq. 683 ; <i>S. C.</i> under name of Bailey <i>v.</i> Piper, 43 L. J. Ch. 704 ; 31 L. T. 86 ; 22 W. R. 943	100, 102, 116
Hopcraft <i>v.</i> Hopcraft, 76 L. T. 341	100, 211
Hopcroft <i>v.</i> Hickman, 2 S. & St. 130 ; 3 L. J. Ch. 43	180
Hope <i>v.</i> Walter, (1900) 1 Ch. 257 ; 69 L. J. Ch. 116 ; 82 L. T. 30 ; 47 W. R. 479	31, 32
Hopkins <i>v.</i> Grazebrook, 6 B. & C. 31 ; 9 D. & R. 22 ; 5 L. J. o.s. K. B. 65	131
Horn <i>v.</i> Baker, 9 East, 215 ; 9 R. R. 541	178
Horne and Hellard, 29 Ch. D. 736 ; 54 L. J. Ch. 919 ; 53 L. T. 562	199
Horniblow <i>v.</i> Shirley, 13 Ves. 81	17, 123
Hornsey Local Board <i>v.</i> Monarch, &c. Society, 24 Q. B. D. 1 ; 59 L. J. Q. B. 105 ; 61 L. T. 867 ; 38 W. R. 85	345
Horrocks <i>v.</i> Rigby, 9 Ch. D. 180 ; 47 L. J. Ch. 800 ; 38 L. T. 782 ; 26 W. R. 714	95, 100, 102
Houldsworth <i>v.</i> City of Glasgow Bank, 5 App. Ca. 317 ; 42 L. T. 194 ; 28 W. R. 677	65
Howard <i>v.</i> Castle, 6 T. R. 642 ; 3 R. R. 296	167
Howard <i>v.</i> Ducane, T. & R. 81 ; 1 L. J. o.s. Ch. 85 ; 23 R. R. 190	199
Howard <i>v.</i> Shaw, 8 M. & W. 118	337
Howe <i>v.</i> Smith, 27 Ch. D. 89 ; 53 L. J. Ch. 1055 ; 50 L. T. 573 ; 32 W. R. 802	309, 415, 416, 417, 419, 420, 421
Howell <i>v.</i> Kightley, 21 Beav. 331 ; 25 L. J. Ch. 341, 868 ; 2 Jur. n.s. 455 ; 27 L. T. o.s. 61 ; 4 W. R. 477	222, 223, 258, 259, 260
Howland <i>v.</i> Norris, 1 Cox. 59	84, 90
Hoy <i>v.</i> Smithies, 22 Beav. 510 ; 28 L. T. o.s. 183 ; 2 Jur. n.s. 1011	365, 372
Hucklesby <i>v.</i> Hook, 1900, W. N. 45 ; 82 L. T. 117	447
Hudson <i>v.</i> Bartram, 3 Mad. 440.	302, 308
Hudson <i>v.</i> Buck, 7 Ch. D. 683 ; 47 L. J. Ch. 247 ; 38 L. T. 56 ; 26 W. R. 190	213
Hudson <i>v.</i> Temple, 29 Beav. 536 ; 30 L. J. Ch. 251 ; 3 L. T. 495 ; 7 Jur. n.s. 248 ; 9 W. R. 243	300, 302, 303, 310, 368
Hughes and Ashley, (1900) 2 Ch. 595 ; 69 L. J. Ch. 741 ; 83 L. T. 390 ; 49 W. R. 67	378, 382
Hughes <i>v.</i> Jones, 3 D. F. & J. 307 ; 31 L. J. Ch. 83 ; 8 Jur. n.s. 399 ; 5 L. T. 408 ; 10 W. R. 139	39, 50, 112, 274, 277
Hughes <i>v.</i> Kearney, 1 Sch. & Lef. 132 ; 9 R. R. 30	328
Hughes <i>v.</i> Morris, 2 D. M. & G. 349 ; 21 L. J. Ch. 761 ; 16 Jur. 603	458
Hughes <i>v.</i> Morris, 9 Ha. 636	316
Hughes <i>v.</i> Parker, 8 M. & W. 244	185

	PAGE
Hulse, <i>Re</i> , (1905) 1 Ch. 406 ; 74 L. J. Ch. 246 ; 92 L. T. 232	177
Hume <i>v.</i> Bentley, 5 De G. & S. 520 ; 21 L. J. Ch. 760 ; 16 Jur. 1109 218, 219, 222	
Hume <i>v.</i> Poeock, 1 Ch. 379 ; 35 L. J. Ch. 731 ; 12 Jur. <i>n.s.</i> 445 ; 14 L. T. 386 ; 14 W. R. 681	77, 214, 236
Humphries <i>v.</i> Horne, 3 Ha. 276 ; 64 R. R. 298	332
Hunter, <i>Ex parte</i> , 6 Ves. 94	421
Hunter <i>v.</i> Daniel, 4 Ha. 420 ; 14 L. J. Ch. 194 ; 9 Jur. 526 ; 4 L. T. o.s. 473 ; 67 R. R. 114	309
Hurlbutt and Chaytor, 57 L. J. Ch. 421 ; 1888, W. N. 11	4, 283
Hussey <i>v.</i> Horne-Payne, 4 App. Ca. 311 ; 48 L. J. Ch. 846 ; 41 L. T. 1 ; 27 W. R. 585	213, 459
Hutchings to Burt, 59 L. T. 490	211
Hutchinson <i>v.</i> Kay, 23 Beav. 413 ; 26 L. J. Ch. 457 ; 29 L. T. o.s. 138 ; 3 Jur. <i>n.s.</i> 652 ; 5 W. R. 341	178
Hutchinson <i>v.</i> Morritt, 3 Y. & C. 547	191
Hyde <i>v.</i> Dallaway, 6 Jur. 119 ; 4 Beav. 606.	232
Hyde <i>v.</i> Warden, 3 Ex. D. 72 ; 47 L. J. Ex. 121 ; 37 L. T. 567 ; 26 W. R. 261	28, 249, 274, 275, 276

I

Jeely <i>v.</i> Grew, 6 N. & M. 467 ; 43 R. R. 553	420
Ilchester, <i>Ex parte</i> , 7 Ves. 348 ; 6 R. R. 138	150
Irish Land Commission <i>v.</i> Maquay, 28 L. R. Ir. 342	336
Irving <i>v.</i> Turnbull, (1900) 2 Q. B. 129	427
Isaacs <i>v.</i> Royal, &c., L. R. 5 Ex. 296 ; 39 L. J. Ex. 189 ; 22 L. T. 681 ; 18 W. R. 982	<i>Add.</i>
Isaacs <i>v.</i> Towell, (1898) 2 Ch. 285 ; 67 L. J. Ch. 508 ; 78 L. T. 619	270, 359, 372

J

Jackson and Haden, (1906) 1 Ch. 412 ; 75 L. J. Ch. 226 ; 94 L. T. 418 ; 54 W. R. 434	119, 271, 283, 312, 358, 359
Jackson and Oakshott, 14 Ch. D. 851 ; 49 L. J. Ch. 523 ; 41 L. T. 719 ; 28 W. R. 794	367
Jackson and Woodburn, 37 Ch. D. 44 ; 57 L. J. Ch. 243 ; 57 L. T. 753 ; 36 W. R. 396	375
Jackson <i>v.</i> Jackson, 1 Sm. & G. 184 ; 22 L. J. Ch. 873 ; 21 L. T. o.s. 98 ; 17 Jur. 293 ; 1 W. R. 264	182
Jackson <i>v.</i> Whitehead, 28 Beav. 154 ; 6 Jur. <i>n.s.</i> 133	229
Jacobs <i>v.</i> Revell, (1900) 2 Ch. 858 ; 69 L. J. Ch. 879 ; 83 L. T. 629 ; 49 W. R. 109	296, 297
James <i>v.</i> Lichfield, 9 Eq. 51 ; 39 L. J. Ch. 248 ; 21 L. T. 521 ; 18 W. R. 158	50
James <i>v.</i> Shore, 1 Stark. N. P. 426 ; 18 R. R. 798	456
Jacques <i>v.</i> Millar, 6 Ch. D. 153 ; 47 L. J. Ch. 544 ; 37 L. T. 151 ; 25 W. R. 846	131, 133, 134, 137, 138, 335
Jarmain <i>v.</i> Egelstone, 5 Car. & P. 572	136

	PAGE
Jarrett <i>v.</i> Hunter, 34 Ch. D. 182 ; 56 L. J. Ch. 141 ; 55 L. T. 727 ; 35 W. R. 132	450, 451, 452, 453, 456
Jefferys <i>v.</i> Fairs, 4 Ch. D. 448 ; 46 L. J. Ch. 113 ; 36 L. T. 10 ; 25 W. R. 227	3
Jegon <i>v.</i> Vivian, 6 Ch. 742 ; 40 L. J. Ch. 389 ; 19 W. R. 365	352
Jenkinson <i>v.</i> Pepys, cited 15 Ves. 521	139, 176
Jennings <i>v.</i> Broughton, 5 D. M. & G. 126 ; 23 L. J. Ch. 999	71
Jervis <i>v.</i> Berridge, 8 Ch. 351 ; 42 L. J. Ch. 518 ; 28 L. T. 481 ; 21 W. R. 395	146
Jervoise <i>v.</i> Northumberland, 1 Jac. & W. 559 ; 21 R. R. 229	188, 192
John <i>v.</i> Jones, 34 L. T. 570	433
John Griffith, &c. <i>v.</i> Humber, &c., (1899) 2 Q. B. 414 ; 68 L. J. Q. B. 959 ; 81 L. T. 310	450
Johnson and Tustin, 30 Ch. D. 42 ; 54 L. J. Ch. 889 ; 53 L. T. 281 ; 33 W. R. 43	410
Johnson <i>v.</i> Smart, 2 Giff. 151 ; 6 Jur. n.s. 815 ; aff. on appeal 21 July, 1860 (<i>see</i> 4 Giff. 152) ; 2 L. T. 307	16
Johnson <i>v.</i> Smiley, 17 Beav. 223 ; 22 L. J. Ch. 826 ; 1 Eq. R. 397 ; 1 W. R. 440	214
Johnston <i>v.</i> Boyes, (1899) 2 Ch. 73 ; 68 L. J. Ch. 425 ; 80 L. T. 488 ; 47 W. R. 517	167, 169, 170, 171, 172, 446
Joliffe <i>v.</i> Baker, 11 Q. B. D. 255 ; 52 L. J. Q. B. 609 ; 48 L. T. 966 ; 32 W. R. 59	152, 154
Jones <i>v.</i> Barnett, (1900) 1 Ch. 370 ; 69 L. J. Ch. 242 ; 82 L. T. 37 ; 48 W. R. 278	383
Jones <i>v.</i> Clifford, 3 Ch. D. 779 ; 45 L. J. Ch. 809 ; 35 L. T. 937 ; 24 W. R. 979	58, 235, 272
Jones <i>v.</i> Edney, 3 Camp. 285 ; 13 R. R. 803	1, 288
Jones <i>v.</i> Evans, 17 L. J. Ch. 469 ; 12 Jur. 664 ; 80 R. R. 192	114, 116
Jones <i>v.</i> Gardiner, (1902) 1 Ch. 191 ; 71 L. J. Ch. 93 ; 86 L. T. 74 ; 50 W. R. 265	318, 336
Jones <i>v.</i> Lewis, 1 De G. & S. 245 ; 9 L. T. o.s. 168 ; 11 Jur. 511 . . .	377
Jones <i>v.</i> Matthie, 16 L. J. Ch. 405 ; 11 Jur. 504, 761	439
Jones <i>v.</i> Mudd, 4 Russ. 118 ; 6 L. J. o.s. Ch. 26 ; 28 R. R. 22	325
Jones <i>v.</i> Nanncy, 13 Pri. 99 ; McClelland, 25	170, 173
Jones <i>v.</i> Rimmer, 14 Ch. D. 588 ; 49 L. J. Ch. 775 ; 43 L. T. 111 ; 29 W. R. 165	13, 38, 50, 157
Jones <i>v.</i> Victoria Dock Co., 2 Q. B. D. 314 ; 46 L. J. Q. B. 219 ; 36 L. T. 347 ; 25 W. R. 501	449
Jones <i>v.</i> Watts, 43 Ch. D. 574 ; 62 L. T. 471 ; 38 W. R. 725	217, 239, 241, 402
Jordan <i>v.</i> Money, 5 H. L. C. 185 ; 23 L. J. Ch. 865	21
Judd and Poland and Skeleher, (1906) 1 Ch. 684 ; 75 L. J. Ch. 403 ; 94 L. T. 595 ; 54 W. R. 513	439

K

Keates <i>v.</i> Cadogan, 10 C. B. 591 ; 20 L. J. C. P. 76 ; 16 L. T. o.s. 367 ; 15 Jur. 428 ; 84 R. R. 715	14, 30
Keeble and Stillwell's, &c., 78 L. T. 383	301, 324
Keighley <i>v.</i> Durant, (1901) A. C. 240 ; 70 L. J. K. B. 662 ; 84 L. T. 777	314

	PAGE
Keillor, <i>Re</i> , Ir. R. 6 Eq. 329	343
Kemble <i>v.</i> Farren, 6 Bing. 141 ; 7 L. J. C. P. 258 ; 31 R. R. 366. 422, 423	
Kemeys <i>v.</i> Proctor, 3 Ves. & B. 57 ; 1 J. & W. 350	448
Kendall <i>v.</i> Hill, 2 L. T. 717 ; 6 Jur. n.s. 968	20, 28
Kennedy <i>v.</i> De Trafford, (1897) A. C. 180 ; 66 L. J. Ch. 413 ; 76 L. T. 427 ; 45 W. R. 671	440
Kenney <i>v.</i> Wexham, 6 Mad. 355 ; 23 R. R. 243	334
Kenworthy <i>v.</i> Schofield, 2 B. & Cr. 945 ; 4 D. & R. 556 ; 2 L. J. o.s. Q. B. 175 ; 26 R. R. 600	454
Kerr <i>v.</i> Pawson, 25 Beav. 394 ; 27 L. J. Ch. 594 ; 31 L. T. o.s. 224 ; 4 Jur. n.s. 425 ; 6 W. R. 447	51, 214
Kershaw <i>v.</i> Kalow, 1 Jur. n.s. 974	435, 436, 437
Kershaw <i>v.</i> Kershaw, 9 Eq. 56 ; 21 L. T. 651 ; 18 W. R. 477	330, 331
Keyse <i>v.</i> Haydon, 20 L. T. o.s. 244 ; 1 W. R. 112	221, 236
Kidd and Gibbon, (1893) 1 Ch. 695 ; 62 L. J. Ch. 436 ; 68 L. T. 647 ; 41 W. R. 507	37, 225
Kine <i>v.</i> Balfe, 2 B. & B. 343	458
King <i>v.</i> Chamberlayn, 1887, W. N. 158	225
King <i>v.</i> Wilson, 6 Beav. 124	24, 69, 86, 305, 307
King <i>v.</i> Witham Nav. Co., 3 B. & Ald. 454	339
Kingdon <i>v.</i> Kirk, 37 Ch. D. 141 ; 57 L. J. Ch. 328 ; 58 L. T. 383 ; 36 W. R. 430	424
Kitchen <i>v.</i> Palmer, 46 L. J. Ch. 611	360, 361, 362, 366
Kitton <i>v.</i> Hewett, 1904, W. N. 21	138
Knatchbull <i>v.</i> Grueber, 1 Mad. 153 ; (aff. 3 Mer. 124) ; 17 R. R. 35	79, 80, 88, 115
Knight <i>v.</i> Crockford, 1 Esp. 190 ; 5 R. R. 729	447
Knight <i>v.</i> Williams, (1901) 1 Ch. 256 ; 70 L. J. Ch. 92 ; 83 L. T. 730 ; 49 W. R. 427	400
Knowles and Goldsmith (not reported)	198
Krehl <i>v.</i> Park, 31 L. T. 325 ; 22 W. R. 477	351

L

Lachlan <i>v.</i> Reynolds, Kay, 52 ; 23 L. J. Ch. 8 ; 22 L. T. o.s. 211 ; 2 W. R. 49	5, 93, 126, 313
Lahey <i>v.</i> Bell, 6 Ir. Eq. R. 122	444
Lake <i>v.</i> Dean, 28 Beav. 607	158, 334
Lamare <i>v.</i> Dixon, L. R. 6 H. L. 414 ; 43 L. J. Ch. 203 ; 2 W. R. 49	143
Lamond <i>v.</i> Davall, 9 Q. B. 1030 ; 16 L. J. Q. B. 136 ; 11 Jur. 266 ; 72 R. R. 502	420
Lander and Bagley, (1892) 3 Ch. 41 ; 61 L. J. Ch. 707 ; 67 L. T. 521	28, 29, 128, 378
Lang <i>v.</i> Gale, 1 M. & Sel. 111	396
Langford <i>v.</i> Selmes, 3 K. & J. 220 ; 3 Jur. n.s. 859	185
Langham and Langham Hotel Co., 60 L. J. Ch. 110 ; 39 W. R. 156	37
Larkin <i>v.</i> Rosse, 10 Ir. Eq. R. 70	92
Lavery <i>v.</i> Purssell, 39 Ch. D. 508 ; 57 L. J. Ch. 570 ; 58 L. T. 846 ; 37 W. R. 163	137, 446
Law <i>v.</i> Law, 9 Jur. 745 ; (aff. 11 Jur. 463) ; 2 Coll. 41 ; 14 L. J. Ch. 313 ; 16 <i>ib.</i> 375	262

	PAGE
<i>Lawes v. Gibson</i> , 1 Eq. 135 ; 35 L. J. Ch. 148 ; 11 Jur. 873 ; 13 L. T. 316 ; 14 W. R. 25	343
<i>Lawrenson v. Butler</i> , 1 Sch. & Lef. 13	212
<i>Lawrie v. Lees</i> , 7 App. Ca. 19 ; 51 L. J. Ch. (H. L.) 209 ; 46 L. T. 210 ; 30 W. R. 285	259, 260
<i>Lawson v. Laude, Dickens</i> , 346	140
<i>Laythoarp v. Bryant</i> , 2 Bing. N. C. 735 ; 3 Sc. 238 ; 5 L. J. C. P. 217	240
<i>Lea v. Whitaker</i> , L. R. 8 C. P. 70 ; 27 L. T. 676 ; 21 W. R. 230	420, 423
<i>Leach v. Mullett</i> , 3 Car. & P. 115 ; 33 R. R. 657	81, 283
<i>Leather, &c. v. Hieronymus</i> , L. R. 10 Q. B. 140 ; 44 L. J. Q. B. 54 ; 32 L. T. 307 ; 23 W. R. 593	150
<i>Lecoy v. Mogford</i> , 2 Jur. n.s. 1084 ; 4 W. R. 805	185
<i>Lee v. Soames</i> , 59 L. T. 366 ; 36 W. R. 884	311, 312
<i>Legal v. Miller</i> , 2 Ves. sen. 299	145
<i>Legge v. Croker</i> , 1 Ball & B. 506 ; 12 R. R. 49	62
<i>Leggott v. Barrett</i> , 15 Ch. D. 306 ; 43 L. T. 641 ; 28 W. R. 962	292
<i>Leggott v. Metropolitan Rail. Co.</i> , 5 Ch. 716 ; 18 W. R. 1060	342
<i>Lehmann and Walker</i> , (1906) 2 Ch. 640 ; 75 L. J. Ch. 768 ; 95 L. T. 259	403
<i>Lehmann v. McArthur</i> , 3 Ch. 496 ; 18 L. T. 806 ; 16 W. R. 877	262, 398
<i>Leigh v. Taylor</i> , (1902) A. C. 157 ; 71 L. J. Ch. 272 ; 86 L. T. 239 ; 50 W. R. 623	177, 178
<i>Le Lièvre v. Gould</i> , (1893) 1 Q. B. 491 ; 62 L. J. Q. B. 353 ; 68 L. T. 626 ; 41 W. R. 468	15
<i>Lennon v. Napper</i> , 2 Sch. & Lef. 682	417
<i>Leppington v. Freeman</i> , 66 L. T. 357 ; 40 W. R. 348	338
<i>Leslie v. Crommelin, Jr.</i> , R. 2 Eq. 134	114
<i>Leslie v. Tompson</i> , 9 Ha. 268 ; 20 L. J. Ch. 561 ; 17 L. T. o.s. 277 ; 15 Jur. 717	73, 109, 111, 115, 181, 291, 298, 299
<i>Lester v. Foxeraft</i> . See <i>Foxeraft v. Lyster</i> .	
<i>Lethbridge v. Kirkman</i> , 25 L. J. Q. B. 89 ; 26 L. T. o.s. 122 ; 2 Jur. n.s. 372 ; 4 W. R. 90	4, 223, 419
<i>Lett v. Randall</i> , 49 L. T. 71	293
<i>Levy v. Stogdon</i> , (1898) 1 Ch. 478 ; (on appeal, [1899] 1 Ch. 5) ; 67 L. J. Ch. 313 ; 68 <i>ib.</i> 19 ; 78 L. T. 185 ; 79 <i>ib.</i> 364	417
<i>Lewis, Ex parte</i> , 3 M. D. & D. 173	431
<i>Lewis v. James</i> , 32 Ch. D. 326 ; 56 L. J. Ch. 163 ; 54 L. T. 260 ; 34 W. R. 619	337
<i>Lewis v. Jones</i> , 4 B. & C. 506 ; 28 R. R. 360	19
<i>Lewis v. South Wales Rail. Co.</i> , 10 Hare, 113 ; 22 L. J. Ch. 209 ; 21 L. T. o.s. 3 ; 16 Jur. 1149 ; 1 W. R. 45	301, 330
<i>Leyland and Taylor</i> , (1900) 2 Ch. 625 ; 69 L. J. Ch. 764 ; 83 L. T. 380 ; 49 W. R. 17	347
<i>Leyland v. Illingworth</i> , 2 D. F. & J. 248 ; 29 L. J. Ch. 611 ; 2 L. T. 587 ; 6 Jur. n.s. 811 ; 8 W. R. 695	6
<i>Life Interest, &c. v. Hand-in-Hand</i> , (1898) 2 Ch. 230 ; 67 L. J. Ch. 548 ; 78 L. T. 708 ; 46 W. R. 668	199, 271
<i>Lincoln v. Areedeckne</i> , 1 Coll. 98	209
<i>Lindsay and Forder</i> , 72 L. T. 832	3, 45
<i>Lineham v. Cotter</i> , 7 Ir. Eq. R. 176	84, 113
<i>Litchfield v. Brown</i> , 23 L. J. Ch. 176	324

	PAGE
Little, <i>Ex parte</i> , 3 Moll. 67	393
Livingstone <i>v.</i> Rawyards Coal Co., 5 App. Ca. 25 ; 42 L. T. 334 ; 28 W. R. 357	352
Lloyd <i>v.</i> Rippingale, cited in argt., 1 Y. & C. Ex. 410	302
Llynvi Coal and Iron Co., <i>Ex parte</i> , 7 Ch. 28 ; 41 L. J. Bkey. 5 ; 25 L. T. 609 ; 20 W. R. 105	133
London Bridge Acts, Re, 13 Sim. 176	379, 384
London (Mayor of) and Tubbs. <i>See</i> Mayor of London and Tubbs.	
London School Board and Foster. <i>See</i> School Board for London and Foster.	
Long <i>v.</i> Collier, 4 Russ. 267 ; 28 R. R. 79.	251
Long <i>v.</i> Millar, 4 C. P. D. 450 ; 48 L. J. Q. B. 596 ; 41 L. T. 306 ; 27 W. R. 720	455
Lord <i>v.</i> Stephens, 1 Y. & C. Ex. 222 ; 41 R. R. 249	213
Low <i>v.</i> Bouverie, (1891) 3 Ch. 82 ; 60 L. J. Ch. 594 ; 65 L. T. 533 ; 40 W. R. 50	23
Lowe, Re, 36 L. J. Notes, 73	429
Loves <i>v.</i> Lush, 14 Ves. 547 ; 9 R. R. 344	192, 193, 202
Lowndes <i>v.</i> Lane, 2 Cox. 363	5, 68, 90
Loyd <i>v.</i> Griffith, 3 Atk. 264	387
Loyes <i>v.</i> Rutherford, Sug. 331	16, 89
Lucas <i>v.</i> James, 7 Ha. 410 ; 18 L. J. Ch. 329 ; 14 L. T. o.s. 308 ; 13 Jur. 912 ; 82 R. R. 147	31, 32, 447
Ludgater <i>v.</i> Love, 44 L. T. 694	64
Lukey <i>v.</i> Higgs, 1 Jur. n.s. 200 ; 25 L. T. o.s. 7 ; 3 Eq. R. 510 ; 3 W. R. 306	391
Lyddal <i>v.</i> Weston, 2 Atk. 19	75, 91, 191, 196
Lysaght <i>v.</i> Edwards, 2 Ch. D. 499 ; 45 L. J. Ch. 554 ; 34 L. T. 787 ; 24 W. R. 778	347

M

Maberley <i>v.</i> Robbins, 5 Taunt. 625	173
Macbryde <i>v.</i> Weekes, 22 Beav. 533 ; 28 L. T. o.s. 135 ; 2 Jur. n.s. 918	274, 301, 303, 305, 306
McCulloch <i>v.</i> Gregory, 3 K. & J. 12 ; 24 L. J. Ch. 246 ; 24 L. T. o.s. 307 ; 2 Jur. n.s. 1134 ; 3 W. R. 231 ; 3 Eq. R. 495	152, 267, 272, 371, 443
Mackay <i>v.</i> Commercial Bank of New Brunswick, L. R. 5 P. C. 394 ; 43 L. J. P. C. 31 ; 30 L. T. 180 ; 22 W. R. 473	65
Mackenzie <i>v.</i> Childers, 43 Ch. D. 265 ; 59 L. J. Ch. 188 ; 62 L. T. 98 ; 38 W. R. 243	21, 439
McKenzie <i>v.</i> Hesketh, 7 Ch. D. 675 ; 47 L. J. Ch. 231 ; 38 L. T. 171 ; 26 W. R. 189	56, 57, 103, 115
Macleay <i>v.</i> Tait, (1906) A. C. 24 ; 75 L. J. Ch. 90 ; 94 L. T. 68 ; 54 W. R. 365	75
Macleod <i>v.</i> Jones, 24 Ch. D. 289 ; 53 L. J. Ch. 145 ; 49 L. T. 321 ; 32 W. R. 43	441
McManus <i>v.</i> Cooke, 35 Ch. D. 681 ; 56 L. J. Ch. 662 ; 56 L. T. 900 ; 35 W. R. 754	457
McMurray <i>v.</i> Spicer, 5 Eq. 527 ; 37 L. J. Ch. 505 ; 48 L. T. 116 ; 16 W. R. 332	306

	PAGE
<i>Maconchy v. Clayton</i> , (1898) 1 Ir. R. 155	314
<i>McQueen v. Farquhar</i> , 11 Ves. 467 ; 8 R. R. 212	81, 86, 200, 201
<i>McVicker's Contract</i> , 25 L. R. Ir. 307	235
<i>Maddison v. Alderson</i> , 8 App. Ca. 467 ; 52 L. J. Q. B. 737 ; 49 L. T. 303 ; 31 W. R. 820	21, 22
<i>Madeley v. Booth</i> , 2 De G. & S. 718 ; 79 R. R. 343	41, 74, 83, 217, 240, 282, 286
<i>Magee v. Lavell</i> , L. R. 9 C. P. 107 ; 43 L. J. C. P. 131 ; 30 L. T. 169 ; 22 W. R. 334	423
<i>Magennis v. Fallon</i> , 2 Moll. 561	8, 16, 43, 79, 89, 276, 308, 352
<i>Mainprice v. Westley</i> , 6 B. & S. 420 ; 34 L. J. Q. B. 229 ; 13 L. T. 560 ; 11 Jur. n.s. 975 ; 14 W. R. 9	167
<i>Malden v. Fyson</i> , 11 Q. B. 292 ; 17 L. J. Q. B. 85 ; 12 Jur. 228	136
<i>Maling v. Hill</i> , 1 Cox, 186	199
<i>Malins v. Freeman</i> , 2 Keen, 25 ; 6 L. J. Ch. 133 ; 44 R. R. 178	53
<i>Mallet v. Bateman</i> , L. R. 1 C. P. 163 ; 1 H. & R. 109 ; 35 L. J. C. P. 40 ; 13 L. T. 410 ; 12 Jur. n.s. 122 ; 14 W. R. 225	170
<i>Malone v. Henshaw</i> , 29 L. R. Ir. 352	341
<i>Manning, Ex parte</i> , 2 P. Wms. 410	327
<i>Manning v. Bailey</i> , 2 Ex. 45 ; 18 L. J. Ex. 77	381
<i>Manser v. Back</i> , 6 Ha. 443 ; 77 R. R. 187	29, 139, 140, 145, 148, 149
<i>Manson v. Thacker</i> , 7 Ch. D. 620 ; 47 L. J. Ch. 312 ; 38 L. T. 209 ; 26 W. R. 604	160, 285, 291, 292
<i>Margravine of Anspach v. Noel</i> . See <i>Anspach v. Noel</i> .	
<i>Marlow v. Smith</i> , 2 P. Wms. 198	207
<i>Marsh's Purchase</i> . See <i>Nat. Prov. Bank and Marsh</i> .	
<i>Marsh and Granville</i> , 24 Ch. D. 11 ; 53 L. J. Ch. 81 ; 48 L. T. 947 ; 31 W. R. 845	201, 230, 238, 243, 244, 255
<i>Marsh v. Jones</i> , 40 Ch. D. 563 ; 60 L. T. 610	326
<i>Marshall and Salt</i> , (1900) 2 Ch. 202 ; 69 L. J. Ch. 542 ; 83 L. T. 147 ; 48 W. R. 508	187, 189
<i>Marshall v. Lynn</i> , 6 M. & W. 109 ; 9 L. J. Ex. 126	150
<i>Martin v. Cotter</i> , 3 J. & L. 496 ; 9 Ir. Eq. R. 351 ; 72 R. R. 100	11, 50, 75, 91, 112
<i>Martin v. Porter</i> , 5 M. & W. 351 ; 2 H. & H. 70 ; 52 R. R. 745	352
<i>Martin v. Pycroft</i> , 2 D. M. & G. 785	145
<i>Martin v. Spicer</i> . See <i>Spicer v. Martin</i> .	
<i>Maskell and Goldfinch</i> , (1895) 2 Ch. 525 ; 64 L. J. Ch. 678 ; 72 L. T. 836 ; 43 W. R. 620	200
<i>Mason v. Armitage</i> , 13 Ves. 25 ; 9 R. R. 131	56
<i>Mason v. Cole</i> , 4 Ex. 375 ; 18 L. J. Ex. 478 ; 80 R. R. 618	46
<i>Mason v. Corder</i> , 2 Marsh, 332 ; 7 Taunt. 9 ; 17 R. R. 427	186
<i>Mather v. Fraser</i> , 2 K. & J. 536 ; 25 L. J. Ch. 361 ; 27 L. T. o.s. 41 ; 2 Jur. n.s. 900 ; 4 W. R. 387	178
<i>Matthias v. Yetts</i> , 46 L. T. 497	17, 70, 72
<i>Matthie v. Edwards</i> . See <i>Jones v. Matthie</i> .	
<i>Maw v. Topham</i> , 19 Beav. 576	101
<i>Mawson v. Fletcher</i> , 6 Ch. 91 ; 40 L. J. Ch. 131 ; 23 L. T. 545 ; 19 W. R. 148	364, 365
<i>Mayor of London and Tubbs</i> , (1894) 2 Ch. 524 ; 63 L. J. Ch. 580 ; 70 L. T. 719	320, 321, 322

	PAGE
Meadows <i>v.</i> Tanner, 5 Mad. 34	166
Meek <i>v.</i> Wendt, 21 Q. B. D. 126; 59 L. T. 558; (aff. [1889] W. N. 14)	132
Metcalfe <i>v.</i> Fowler, 6 M. & W. 830; 10 L. J. Ex. 84	135
Metropolitan Railway Co. <i>v.</i> Defries, 2 Q. B. D. 189. 387; 36 L. T. 494; 25 W. R. 841	342
Mieholls <i>v.</i> Corbett, 3 D. J. & S. 18	230
Midgley <i>v.</i> Coppock, 4 Ex. D. 309; 48 L. J. Ex. 674; 40 L. T. 870; 28 W. R. 161	344, 347
Midgley <i>v.</i> Smith, (1893) W. N. 120	250
Millard <i>v.</i> Balby, (1905) 1 K. B. 60; 74 L. J. K. B. 45; 91 L. T. 730; 53 W. R. 165	345
Milligan <i>v.</i> Cooke, 16 Ves. 1 5, 111, 121, 123.	125
Mills <i>v.</i> Oddy, 6 Car. & P. 728; 1 Gale, 92; 3 D. P. C. 722; 2 C. M. & R. 103; 40 R. R. 847	129
Milnes <i>v.</i> Gery, 14 Ves. 400; 9 R. R. 307 179, 180, 181, 453	
Minchin <i>v.</i> Nance, 4 Beav. 332; 55 R. R. 99	329, 350
Minet <i>v.</i> Leman, 7 D. M. & G. 340; 1 Jur. n.s. 410, 692; 3 W. R. 580	231
Minton <i>v.</i> Kirwood, 1 Eq. 449; 35 L. J. Ch. 393; 13 L. T. 743; 14 W. R. 274; (on app. 3 Ch. 614)	162
Mitchell <i>v.</i> Hayne, 2 S. & St. 63; 25 R. R. 151	174
Mittelholzer <i>v.</i> Fullerton, 6 Q. B. 989; 9 Jur. 334	412
Moeser <i>v.</i> Wisker, L. R. 6 C. P. 120; 40 L. J. C. P. 94; 24 L. T. 134; 19 W. R. 351	161, 459
Mogridge <i>v.</i> Clapp, (1892) 3 Ch. 382; 61 L. J. Ch. 534; 67 L. T. 100; 40 W. R. 663	193, 194, 195
Molyneux and White, 15 L. R. Ir. 383	223
Molyneux <i>v.</i> Hawtrey, (1903) 2 K. B. 487; 72 L. J. K. B. 873; 89 L. T. 350; 52 W. R. 23	250
Monekton and Gilzean, 27 Ch. D. 555; 54 L. J. Ch. 257; 51 L. T. 320; 32 W. R. 973	324, 331, 360, 362, 384
Monk <i>v.</i> Huskisson, 4 Russ. 121 n.	323, 325
Monro <i>v.</i> Taylor, 3 Mae. & G. 713; 21 L. J. Ch. 525	251, 326, 354
Monti <i>v.</i> Barnes, (1901) 1 K. B. 205; 70 L. J. K. B. 225; 83 L. T. 619; 49 W. R. 147	178
Moody and Yates, 30 Ch. D. 344; 54 L. J. Ch. 886; 53 L. T. 845; 33 W. R. 785	258, 411
Mordy and Cowman, 51 L. T. 721	393
Morgan <i>v.</i> Griffith, L. R. 6 Ex. 70; 40 L. J. Ex. 46; 23 L. T. 783; 19 W. R. 957	146
Morgan <i>v.</i> Milman, 3 D. M. & G. 24; 22 L. J. Ch. 897; 17 Jur. 193; 20 L. T. o.s. 285; 1 W. R. 134	180
Morley <i>v.</i> Clavering, 29 Beav. 84; 7 Jur. n.s. 904	53, 54, 395
Morley <i>v.</i> Cook, 2 Ha. 106; 12 L. J. Ch. 136; 7 Jur. 79; 62 R. R. 41 160, 264, 268, 270, 356, 366, 371	
Morphett <i>v.</i> Jones, 1 Swa. 172; 18 R. R. 48	457
Morris <i>v.</i> Debenham, 2 Ch. D. 540; 34 L. T. 205; 24 W. R. 636	433
Morris <i>v.</i> Kearsley, 2 Y. & C. Ex. 139; 47 R. R. 379	263
Morris <i>v.</i> Preston, 7 Ves. 547	110
Morris <i>v.</i> Wilson, 5 Jur. n.s. 168; 33 L. T. o.s. 356	451

	PAGE
<i>Morse v. Merest</i> , 6 <i>Mad.</i> 26 ; 22 <i>R. R.</i> 226	181
<i>Mortimer v. Bell</i> , 1 <i>Ch.</i> 10 ; 35 <i>L. J. Ch.</i> 25 ; 13 <i>L. T.</i> 348 ; 11 <i>Jur.</i> 897 ; 14 <i>W. R.</i> 68	168
<i>Mortlock v. Buller</i> , 10 <i>Ves.</i> 292 ; 7 <i>R. R.</i> 417	85, 105, 106, 113
<i>Morton and Hallett</i> , 15 <i>Ch. D.</i> 143 ; 49 <i>L. J. Ch.</i> 559 ; 42 <i>L. T.</i> 602 ; 28 <i>W. R.</i> 895	203
<i>Mosley v. Hyde</i> , 17 <i>Q. B.</i> 91 ; 20 <i>L. J. Q. B.</i> 539 ; 17 <i>L. T. o.s.</i> 106 ; 15 <i>Jur.</i> 899	224
<i>Mostyn v. Mostyn</i> , (1893) 3 <i>Ch.</i> 376 ; 62 <i>L. J. Ch.</i> 959 ; 69 <i>L. T.</i> 741 ; 42 <i>W. R.</i> 17	383
<i>Mostyn v. West Mostyn Colliery Co.</i> , 1 <i>C. P. D.</i> 145 ; 45 <i>L. J. C. P.</i> 401 ; 34 <i>L. T.</i> 325 ; 24 <i>W. R.</i> 401	39, 63
<i>Moulton v. Edmonds</i> , 1 <i>D. F. & J.</i> 246 ; 29 <i>L. J. Ch.</i> 181 ; 1 <i>L. T.</i> 391 ; 6 <i>Jur. n.s.</i> 395 ; 8 <i>W. R.</i> 153	191, 401
<i>Moxhay v. Inderwick</i> , 1 <i>De G. & S.</i> 708 ; 11 <i>Jur.</i> 837	391
<i>Mullens v. Miller</i> , 22 <i>Ch. D.</i> 194 ; 52 <i>L. J. Ch.</i> 380 ; 48 <i>L. T.</i> 103 ; 31 <i>W. R.</i> 559	6, 29, 147
<i>Mullings v. Trinder</i> , 10 <i>Eq.</i> 449 ; 39 <i>L. J. Ch.</i> 833 ; 23 <i>L. T.</i> 580 ; 18 <i>W. R.</i> 1186	188, 202, 203, 204, 205, 207
<i>Murchie v. Black</i> , 12 <i>C. B. n.s.</i> 190 ; 34 <i>L. J. C. P.</i> 337 ; 12 <i>L. T.</i> 735 ; 11 <i>Jur. n.s.</i> 608 ; 13 <i>W. R.</i> 896	429
<i>Murray and Hegarty</i> , 15 <i>L. R. Ir.</i> 510	411
<i>Myers v. Watson</i> , 1 <i>Sim. n.s.</i> 523 ; 10 <i>H. L. Ca.</i> 672 (under the name <i>Rose v. Watson</i>)	21, 143

N

<i>Nalder, &c. v. Harman</i> , 83 <i>L. T.</i> 257.	428
<i>Nash v. Browne</i> , 32 <i>L. J. Ch.</i> 148 ; 7 <i>L. T.</i> 667 ; 9 <i>Jur. n.s.</i> 431.	234
<i>Nash v. Calthorpe</i> , (1905) 2 <i>Ch.</i> 237 ; 74 <i>L. J. Ch.</i> 493 ; 93 <i>L. T.</i> 585.	75
<i>National Coffee Palace Co., Re.</i> 24 <i>Ch. D.</i> 367 ; 53 <i>L. J. Ch.</i> 57 ; 50 <i>L. T.</i> 38 ; 32 <i>W. R.</i> 236	132
<i>National Provincial Bank and Marsh.</i> , (1895) 1 <i>Ch.</i> 190 ; 64 <i>L. J. Ch.</i> 255 ; 71 <i>L. T.</i> 629 ; 43 <i>W. R.</i> 186	158, 217, 219, 237, 278
<i>Naylor v. Goodall</i> , 47 <i>L. J. Ch.</i> 53 ; 37 <i>L. T.</i> 422 ; 26 <i>W. R.</i> 162	105
<i>Neale and Drew</i> , 41 <i>Sol. J.</i> 274	283
<i>Nelson v. Bridges</i> , 2 <i>Beav.</i> 239	351
<i>Nelthorpe v. Holgate</i> , 1 <i>Coll.</i> 203 ; 8 <i>Jur.</i> 551 ; 66 <i>R. R.</i> 46.	50, 108, 113, 358, 374
<i>New Land, &c. and Gray.</i> , (1892) 2 <i>Ch.</i> 138 ; 61 <i>L. J. Ch.</i> 495 ; 67 <i>L. T.</i> 90 ; 41 <i>W. R.</i> 75	127, 187, 192, 206, 209
<i>Newby v. Paynter.</i> See <i>Painter v. Newby.</i>	
<i>Newman, Re.</i> 4 <i>Ch. D.</i> 724	422, 423
<i>Newman v. Rogers</i> , 4 <i>Bro. Ch. C.</i> 391	303
<i>Nicholson v. Brown</i> , 1897, <i>W. N.</i> 52	424
<i>Nicholson v. Burkholder</i> , 21 <i>United Canada Reports</i> , 108	196
<i>Nicholson v. Nicholson</i> , 5 <i>L. J. Ch.</i> 51	334
<i>Nicol's Case</i> , 3 <i>De G. & J.</i> 387	67, 72
<i>Nicoll v. Chambers</i> , 11 <i>C. B.</i> 996 ; 21 <i>L. J. C. P.</i> 54 ; 18 <i>L. T. o.s.</i> 243	234, 252, 297

	PAGE
Nisbet and Potts, (1906) 1 Ch. 386 ; 75 L. J. Ch. 238 ; 94 L. T. 297 ; 54 W. R. 286	219, 238
Noble v. Edwardes, 5 Ch. D. 378 ; 37 L. T. 7	310, 419
Noble v. Ward, L. R. 2 Ex. 135 ; 36 L. J. Ex. 91 ; 15 L. T. 672 ; 15 W. R. 520	150
Norfolk v. Worthy, 1 Camp. 337 ; 10 R. R. 749	88, 288, 290
North v. Percival, (1898) 2 Ch. 128 ; 67 L. J. Ch. 321 ; 78 L. T. 615 ; 46 W. R. 552	319
Northampton Gas Light v. Parnell, 15 C. B. 630 ; 3 C. L. R. 409 ; 24 L. J. C. P. 60 ; 1 Jur. n.s. 211 ; 3 W. R. 179	180
Northumberland v. Att. Gen., (1905) A. C. 406 ; 74 L. J. K. B. 374 ; 93 L. T. 88 ; 54 W. R. 31	209
Norton, Ex parte. See Brall, Re.	
Norton v. Dashwood, (1896) 2 Ch. 497 ; 65 L. J. Ch. 737 ; 75 L. T. 205 ; 44 W. R. 680	177
Notley v. Salmon, 1 W. R. 240	166, 170
Nott v. Riccard, 22 Beav. 307 ; 25 L. J. Ch. 618 ; 26 L. T. o.s. 267 ; 2 Jur. n.s. 1038 ; 4 W. R. 269	225, 262, 307
Nottingham, &c. v. Butler, 16 Q. B. D. 778 ; 55 L. J. Q. B. 280 ; 54 L. T. 444 ; 34 W. R. 405	10, 12, 29, 126, 158, 161, 187, 189, 193, 226, 227, 285, 427
Nonaille v. Flight, 7 Beav. 521 ; 13 L. J. Ch. 414 ; 8 Jur. 838 ; 64 R. R. 139	92, 125, 186
Noyes v. Paterson, (1894) 3 Ch. 267 ; 63 L. J. Ch. 748 ; 71 L. T. 228 ; 43 W. R. 377	201
Nunn v. Haneock, 6 Ch. 850 ; 40 L. J. Ch. 700 ; 25 L. T. 469 ; 19 W. R. 1041	230
Nurse v. Seymour, 13 Beav. 254	46
Nutt v. Easton, (1899) 1 Ch. 873 ; 68 L. J. Ch. 367 ; 80 L. T. 353 ; 47 W. R. 430 ; (aff. [1900] 1 Ch. 29)	199

O

Oakden v. Pike, 34 L. J. Ch. 620 ; 12 L. T. 527 ; 11 Jur. n.s. 666 ; 13 W. R. 673	264, 265, 266, 267, 272, 273
Ockenden v. Henley, 1 E. B. & E. 485 ; 27 L. J. Q. B. 361 ; 31 L. T. o.s. 179 ; 4 Jur. n.s. 999	420
Offen v. Harman, 29 L. J. Ch. 307 ; 1 D. F. & J. 253 ; 1 L. T. 315 ; 6 Jur. n.s. 487 ; 8 W. R. 129	404
Official Receiver v. Cooke, (1906) 2 Ch. 661	Add.
Ogilvie v. Foljambe, 3 Mer. 51 ; 17 R. R. 13	141, 184
Okeden v. Clifden, 2 Russ. 309	210
Okill v. Whittaker, 2 Ph. 338 ; 1 De G. & S. 83 ; 16 L. J. Ch. 454 ; 11 Jur. 681 ; 78 R. R. 104	279
Oldfield v. Round. See Bowles v. Round.	
Oliver v. Hunting, 44 Ch. D. 205 ; 59 L. J. Ch. 255 ; 62 L. T. 108 ; 38 W. R. 618	455
Olley v. Fisher, 34 Ch. D. 367 ; 56 L. J. Ch. 208 ; 55 L. T. 807 ; 35 W. R. 391	142
Onslow v. Londesborough, 10 Ha. 67	406, 408
Orange to Wright, 54 L. J. Ch. 590 ; 52 L. T. 606	43, 284

	PAGE
Ord v. Noel, 5 Mad. 438 ; 21 R. R. 328	105
Osbaldiston v. Askew, 2 Jac. & W. 539 ; 1 Russ. 160 ; 25 R. R. 21 . . .	86
Osborn v. Osborn, 18 W. R. 421	222, 243
Osborne to Rowlett, 13 Ch. D. 774 ; 49 L. J. Ch. 310 ; 42 L. T. 650 ; 28 W. R. 365	188, 203
Osborne v. Bradley, (1903) 2 Ch. 446 ; 73 L. J. Ch. 49 ; 89 L. T. 11 . . .	428
Osborne v. Harvey, 1 Y. & C. C. C. 116 ; 12 L. J. Ch. 66 ; 7 Jur. 229 ; 57 R. R. 266	275, 399, 401

P

Page v. Adam, 4 Beav. 269 ; 10 L. J. Ch. 407 ; 5 Jur. 793 ; 55 R. R. 70	361
Painter v. Newby, 11 Ha. 26 ; 22 L. J. Ch. 871 ; 17 Jur. 483 ; 1 Eq. R. 173 ; 1 W. R. 284	79, 111, 112, 281, 282, 286, 291, 292, 357, 363, 364, 365
Palmer v. Goren, 25 L. J. Ch. 841 ; 4 W. R. 688	352
Palmer v. Johnson, 13 Q. B. D. 351 ; 53 L. J. Q. B. 348 ; 51 L. T. 211 ; 33 W. R. 36	155, 291
Palmer v. Locke, 15 Ch. D. 294	200
Palmer v. Locke, 18 Ch. D. 381 ; 51 L. J. Ch. 124 ; 45 L. T. 229 ; 30 W. R. 419	206, 208
Palmer v. Temple, 9 Ad. & E. 508 ; 1 P. & D. 379 ; 8 L. J. Q. B. 179 ; 48 R. R. 468	415
Palmerston v. Turner, 33 Beav. 524 ; 33 L. J. Ch. 457 ; 10 L. T. 364 ; 10 Jur. n.s. 577 ; 4 N. R. 46 ; 12 W. R. 816	318, 319
Paramore v. Greenslade, 1 Sm. & G. 541 ; 23 L. J. Ch. 34 ; 22 L. T. o.s. 182 ; 17 Jur. 1064	412
Parfitt v. Jepson, 46 L. J. C. P. 529 ; 36 L. T. 251	164
Parker and Beech, 54 L. T. 750 ; 56 <i>ib.</i> 95	381
Parker v. Frith, 1 Sim. & St. 199 n.	303
Parkin v. Thorold, 16 Beav. 59 ; 2 Sim. n.s. 1 ; 22 L. J. Ch. 170 ; 16 Jur. 959	304, 305, 308
Parr v. Lovegrove, 4 Drew. 170 ; 31 L. T. o.s. 364 ; 4 Jur. n.s. 600 ; 6 W. R. 201	238, 264, 325, 402
Paterson v. Long, 5 Beav. 186 ; 59 R. R. 461	248, 380
Paterson v. Long, 6 Beav. 590 ; 13 L. J. Ch. 1 ; 7 Jur. 1049 ; 2 L. T. o.s. 116 ; 63 R. R. 191	426
Patman v. Harland, 17 Ch. D. 353 ; 50 L. J. Ch. 642 ; 44 L. T. 728 ; 29 W. R. 707	244
Patrick v. Miher, 2 C. P. D. 342 ; 46 L. J. C. P. 537 ; 36 L. T. 738 ; 25 W. R. 790	304
Payne v. Cave, 3 T. R. 148 ; 1 R. R. 679.	170
Peacock v. Penson, 11 Beav. 355 ; 18 L. J. Ch. 57 ; 12 L. T. o.s. 329 ; 12 Jur. 954 ; 83 R. R. 193	9, 16, 46, 98, 101, 122
Pearce v. Gardner, (1897) 1 Q. B. 688 ; 66 L. J. Q. B. 457 ; 76 L. T. 441 ; 45 W. R. 518	455
Pearce v. Watts, 20 Eq. 492 ; 44 L. J. Ch. 492 ; 23 W. R. 771	9
Pearl Life, &c. v. Buttenshaw, 1893, W. N. 123	137
Pease v. Coats, 2 Eq. 688 ; 14 L. T. 886 ; 12 Jur. n.s. 684 ; 14 W. R. 1021	2

	PAGE
Peck and London School Board, (1893) 2 Ch. 315 ; 62 L. J. Ch. 598 ; 68 L. T. 847 ; 41 W. R. 388	382
Peek <i>v.</i> Derry. <i>See</i> Derry <i>v.</i> Peck.	
Peers <i>v.</i> Lambert, 7 Beav. 546 ; 64 R. R. 148	87
Pegg <i>v.</i> Wisden, 16 Beav. 239 ; 20 L. T. o.s. 174 ; 16 Jur. 1105 ; 1 W. R. 43	274, 307
Pegler <i>v.</i> White, 33 Beav. 403 ; 33 L. J. Ch. 569 ; 10 L. T. 84 ; 10 Jur. n.s. 330 ; 3 N. R. 557 ; 12 W. R. 455	50, 189, 260
Pearce <i>v.</i> Corf, L. R. 9 Q. B. 210 ; 43 L. J. Ch. 230 ; 30 L. T. 252 ; 4 Jur. n.s. 225 ; 6 W. R. 179	449, 456
Pelly and Jacob, 80 L. T. 45	263, 321
Pember <i>v.</i> Mathers, 1 Bro. Ch. C. 52 ; 2 Dick. 550	139
Pembroke <i>v.</i> Thorpe, 3 Swa. 437 n. ; 19 R. R. 254	458
Penniall <i>v.</i> Harborne, 11 Q. B. 368 ; 17 L. J. Q. B. 94 ; 12 Jur. 159 ; 10 L. T. o.s. 305 ; 75 R. R. 415	39, 186
Perkins <i>v.</i> Ede, 16 Beav. 193 ; 1 W. R. 10	87
Perriam, Re, 49 L. T. 710 ; 32 W. R. 369	112, 153, 277
Perry <i>v.</i> Smith, Car. & M. 554 ; 9 M. & W. 681 ; 11 L. J. Ex. 269 ; 60 R. R. 869	318
Peter <i>v.</i> Nicolls, 11 Eq. 391 ; 24 L. T. 381 ; 19 W. R. 618	202
Peterson <i>v.</i> Elwes, 6 W. R. 611	414
Peto <i>v.</i> Hammond, 30 Beav. 495	244
Peyton's Settlement, Re, 30 Beav. 252 ; 31 L. J. Ch. 440 ; 6 L. T. 882 ; 8 Jur. n.s. 458 ; 10 W. R. 515	431
Phelps <i>v.</i> Prothero, 7 D. M. & G. 722 ; 25 L. J. Ch. 105 ; 2 Jur. n.s. 173 ; 4 W. R. 189	351
Phillips <i>v.</i> Caldeleugh, L. R. 4 Q. B. 159 ; 38 L. J. Q. B. 68 ; 20 L. T. 80 ; 17 W. R. 575	185, 216, 218, 219, 244, 291
Phillips <i>v.</i> Everard, 5 Sim. 102 ; 35 R. R. 124	396
Phillips <i>v.</i> Homfray, 6 Ch. 770	352
Phillips <i>v.</i> Miller, L. R. 10 C. P. 420 ; 44 L. J. C. P. 265 ; 32 L. T. 638 ; 23 W. R. 834	38, 50, 295
Phillips <i>v.</i> Silvester, 8 Ch. 173 ; 42 L. J. Ch. 225 ; 27 L. T. 840 ; 21 W. R. 179	329, 341, 350, 351
Phipps <i>v.</i> Child, 3 Drew. 709	143, 212
Phœnix, &c. <i>v.</i> Spooner, (1905) 2 K. B. 753 ; 74 L. J. K. B. 792 ; 93 L. T. 306 ; 54 W. R. 312	348
Pickering <i>v.</i> Dowson, 4 Taunt. 785 ; 39 R. R. 656	24
Pickett <i>v.</i> Loggon, 14 Ves. 215 ; 2 B. & P. 22	383
Pickles <i>v.</i> Sutcliffe, 1902, W. N. 200	456
Piggott <i>v.</i> Stratton, 1 D. F. & J. 33 ; 29 L. J. Ch. 1 ; 6 Jur. n.s. 129 ; 1 L. T. 111 ; 8 W. R. 13	23
Pigott and G. W. Rail. Co., 18 Ch. D. 146 ; 50 L. J. Ch. 679 ; 44 L. T. 792 ; 29 W. R. 727	325
Pilmore <i>v.</i> Hood, 5 Bing. N. C. 97 ; 6 Scott, 827 ; 50 R. R. 622	55, 64
Pinke <i>v.</i> Curteis, 4 Bro. C. C. 329	308
Plews <i>v.</i> Samuel, (1904) 1 Ch. 464 ; 73 L. J. Ch. 279 ; 90 L. T. 533 ; 52 W. R. 410	342
Pollard <i>v.</i> Gare, (1901) 1 Ch. 834 ; 70 L. J. Ch. 404 ; 84 L. T. 352	428
Pollock <i>v.</i> Rabbits, 21 Ch. D. 466 ; 47 L. T. 637 ; 31 W. R. 150, 378, 391	
Poole and Clarke, (1904) 2 Ch. 173 ; 73 L. J. Ch. 612 ; 91 L. T. 275 ; 53 W. R. 122	390

	PAGE
Poole <i>v.</i> Adams, 33 L. J. Ch. 639; 10 L. T. 287; 12 W. R. 683; 4 N. R. 9	348
Poole <i>v.</i> Hill, 6 M. & W. 835; 9 Dowl. 300; 10 L. J. Ex. 81; 55 R. R. 805	315, 376, 411
Poole <i>v.</i> Shergold, 2 Bro. C. C. 118; 1 Cox, 273; 1 R. R. 37	88, 338
Pope <i>v.</i> Garland, 4 Y. & C. 394; 10 L. J. Ex. Eq. 13	2, 32, 43, 91, 248, 249
Pope <i>v.</i> G.E.R., 3 Eq. 171; 36 L. J. Ch. 60; 15 L. T. 239; 15 W. R. 192	337
Popple and Barratt, 25 W. R. 248	382
Poppleton (or Popple) and Jones, 74 L. T. 582; 25 W. R. 248	197
Portman <i>v.</i> Mill, 2 Russ. 570; 26 R. R. 175	4, 280, 294
Portman <i>v.</i> Mill, 1 Russ. & M. 696	91
Postlethwaite, Re, 37 W. R. 200; 60 L. T. 514	201
Postmaster-General and Colgan, (1906) 1 Ir. R. 287, 477	<i>Add.</i>
Pott <i>v.</i> Turner, 4 Moo. & P. 551; 6 Bing. 702; 8 L. J. o.s. C. P. 282	202
Potter <i>v.</i> Duffield, 18 Eq. 4; 43 L. J. Ch. 472; 50 L. T. 104; 22 W. R. 585	451
Poulett <i>v.</i> Hood, 5 Eq. 115; 37 L. J. Ch. 224; 17 L. T. 486; 16 W. R. 323	385, 406
Pounsett <i>v.</i> Fuller, 17 C. B. 660; 25 L. J. C. P. 145	130, 136
Powell <i>v.</i> Doubble, Sug. 29	16, 89
Powell <i>v.</i> Elliot, 10 Ch. 424; 33 L. T. 110; 23 W. R. 777	19, 93, 108, 118
Powell <i>v.</i> Marshall, (1899) 1 Q. B. 710; 68 L. J. Q. B. 477; 80 L. T. 509; 47 W. R. 419	311, 418
Powell <i>v.</i> Martyr, 8 Ves. 146; 7 R. R. 7	331
Powell <i>v.</i> Powell, 19 Eq. 422; 44 L. J. Ch. 311; 32 L. T. 148; 23 W. R. 482	127, 369, 443
Powell <i>v.</i> South Wales Ry. Co., 1 Jur. N.S. 773	117, 124
Power <i>v.</i> Barrett, 19 L. R. Ir. 450	14
Prendergast <i>v.</i> Eyre, 2 Hogan, 81; Ll. & G. temp. Pl. 180	84
Price <i>v.</i> Dyer, 17 Ves. 356; 11 R. R. 102	149, 150
Price <i>v.</i> Griffith, 1 D. M. & G. 80; 21 L. J. Ch. 78; 18 L. T. o.s. 190; 15 Jur. 1093	100
Price <i>v.</i> Macaulay, 2 D. M. & G. 339; 19 L. T. o.s. 238	82, 111, 269, 286, 292, 356
Price <i>v.</i> North, 2 Y. & C. Ex. 620; 7 L. J. Ex. Eq. 9; 47 R. R. 470	298
Proctor <i>v.</i> Bayley, 42 Ch. D. 390; 59 L. J. Ch. 12; 38 W. R. 100	137
Prosser <i>v.</i> Watts, 6 Mad. 59; 22 R. R. 238	196
Pryce-Jones <i>v.</i> Williams, (1902) 2 Ch. 517; 71 L. J. Ch. 762; 87 L. T. 260; 50 W. R. 586	269, 270
Public Works Commissioner <i>v.</i> Hills, (1906) A. C. 368; 75 L. J. P. C. 69; 94 L. T. 833	422
Puckett and Smith, (1902) 2 Ch. 258; 71 L. J. Ch. 666; 87 L. T. 189; 50 W. R. 532	34, 284, 295
Pursell and Deakin, 1893, W. N. 152	240
Pye <i>v.</i> British Automobile, &c., (1906) 1 K. B. 425; 75 L. J. K. B. 270	423, 424
Pyrke <i>v.</i> Waddingham, 10 Ha. 1	186, 188, 191, 204, 206, 207

Q

Quiney, Ex parte, 1 Atk. 477	PAGE 177
Quinion v. Horne, (1906) 1 Ch. 596 ; 75 L. J. Ch. 293 ; 54 W. R. 344	366, 368

R

Rabbett v. Raikes, Woodfall Landl. & T. (ed. 16), 658	175
Radford v. Willis, 7 Ch. 7 ; 41 L. J. Ch. 19 ; 25 L. T. 720 ; 20 W. R. 132	209
Raffety v. Schofield, (1897) 1 Ch. 937 ; 66 L. J. Ch. 448 ; 76 L. T. 648 ; 45 W. R. 460	341
Rainbow v. Hawkins, (1904) 2 K. B. 322 ; 73 L. J. K. B. 641 ; 91 L. T. 149 ; 53 W. R. 46	166, 167, 170
Ralph, Ex parte, De G. 219	392
Ramsbottom v. Gosden, 1 Ves. & B. 165 ; 12 R. R. 207	145
Ramsden v. Hirst, 27 L. J. Ch. 482 ; 31 L. T. o.s. 325 ; 6 W. R. 349 ; 4 Jur. n.s. 200	107, 119, 120
Ramuz and Edwards, 37 Sol. J. 701	270, 360
Randall v. Hall, 4 De G. & S. 343	45
Rashdall v. Ford, 2 Eq. 750 ; 35 L. J. Ch. 769 ; 14 W. R. 950	19
Ray, Re, (1896) 1 Ch. 468 ; 65 L. J. Ch. 316 ; 73 L. T. 723 ; 44 W. R. 353	385
Rayner's Trustees and Greenaway, 53 L. T. 495	435
Rayner v. Preston, 18 Ch. D. 1 ; 50 L. J. Ch. 472 ; 44 L. T. 787 ; 29 W. R. 546	194, 348
Rede v. Oakes, 4 D. J. & S. 505 ; 34 L. J. Ch. 145 ; 11 L. T. 549 ; 10 Jur. n.s. 1246 ; 13 W. R. 303 ; 5 N. R. 209	432, 433, 434, 440
Redgrave v. Hurd, 20 Ch. D. 1 ; 51 L. J. Ch. 113 ; 45 L. T. 485 ; 30 W. R. 251	10, 70, 72, 138, 147
Reeve v. Berridge, 20 Q. B. D. 523 ; 57 L. J. Q. B. 265 ; 58 L. T. 836 ; 36 W. R. 517	249, 375
Reeves v. Gill, 1 Beav. 375 ; 49 R. R. 386	378
Reg. v. Swindon, 4 Q. B. D. 305 ; 48 L. J. M. C. 119 ; 40 L. T. 424 ; 27 W. R. 732	345
Regent's Canal Co. v. Ware, 23 Beav. 575 ; 26 L. J. Ch. 566 ; 29 L. T. o.s. 274 ; 3 Jur. n.s. 924 ; 5 W. R. 617	329
Reilly v. Jones, 1 Bing. 302 ; 8 Moo. 244 ; 1 L. J. o.s. C. P. 105	422, 423
Rex v. Marsh, 3 Y. & J. 331 ; 32 R. R. 813	164, 169
Reynell v. Sprye, 1 D. M. & G. 660 ; 21 L. J. Ch. 633	70
Reynolds v. Ashby, (1903) 1 K. B. 87 ; 72 L. J. K. B. 51 ; 87 L. T. 640 ; 51 W. R. 405	178
Reynolds v. Nelson, 6 Mad. 18 ; 22 R. R. 225.	305, 309, 369
Rhodes v. Ibbetson, 4 D. M. & G. 787 ; 23 L. J. Ch. 459 ; 2 Eq. R. 76	160, 243
Rhys v. Dare Valley Rail. Co., 19 Eq. 93 ; 23 W. R. 23	326
Richardson v. Chason, 10 Q. B. 756 ; 16 L. J. Q. B. 890 ; 11 Jur. 890	136
Richardson v. Silvester, L. R. 9 Q. B. 34 ; 43 L. J. Q. B. 1 ; 29 L. T. 395 ; 22 W. R. 74	171

	PAGE
Richardson <i>v.</i> Smith, 5 Ch. 648 ; 39 L. J. Ch. 877 ; 19 W. R. 81 .	81, 181, 182
Riches, <i>Ex parte</i> , 27 Sol. J. 313	84, 282
Ridgway <i>v.</i> Gray, 1 Mac. & G. 109 ; 1 H. & Tw. 195 ; 84 R. R. 26	84, 121, 125, 287
Ridgway <i>v.</i> Sneyd, Kay. 627	34
Riley to Streatfield, 34 Ch. D. 386 ; 56 L. J. Ch. 442 ; 56 L. T. 48 ; 35 W. R. 470	324, 331
Ringer to Thompson, 51 L. J. Ch. 42 ; 45 L. T. 480	189, 195, 260
Rippinghall <i>v.</i> Lloyd, 5 B. & Ad. 742 ; 2 Nev. & Man. 410	399, 402
Rishton <i>v.</i> Whatmore, 8 Ch. D. 467 ; 47 L. J. Ch. 629 ; 26 W. R. 827	454, 455
Roberts <i>v.</i> Berry, 3 D. M. & G. 284 ; 22 L. J. Ch. 398 ; 20 L. T. o.s. 215	263, 309
Roberts <i>v.</i> Bozon, 3 L. J. o.s. Ch. 113	169
Roberts <i>v.</i> Wyatt, 2 Taunt. 268 ; 11 R. R. 566	374
Robertson <i>v.</i> Norris, 1 Giff. 421 ; 4 Jur. n.s. 155, 443	440
Robertson <i>v.</i> Skelton, 12 Beav. 260, 363 ; 19 L. J. Ch. 140 ; 14 L. T. o.s. 542 ; 85 R. R. 89, 121	319, 347, 348
Robins <i>v.</i> Evans, 2 H. & C. 410 ; 33 L. J. Ex. 68 ; 11 L. T. 211 ; 10 Jur. n.s. 473 ; 12 W. R. 604	2, 26, 84, 157, 290
Robinson <i>v.</i> Harman, 1 Ex. 850 ; 18 L. J. Ex. 202	132
Robinson <i>v.</i> Musgrove, 2 Moo. & R. 92 ; 8 Car. & P. 469	86, 253, 272, 290
Robinson <i>v.</i> Page, 3 Russ. 114 ; 27 R. R. 26	150
Robinson <i>v.</i> Wall, 2 Ph. 372 ; 16 L. J. Ch. 401 ; 9 L. T. o.s. 389 ; 11 Jur. 577 ; 78 R. R. 119	166
Robson <i>v.</i> Flight, 4 D. J. & S. 608 ; 34 L. J. Ch. 226 ; 11 L. T. 725 ; 13 W. R. 393	244
Roffey <i>v.</i> Shallcross, 4 Mad. 227 ; 20 R. R. 293	86
Rogers <i>v.</i> Waterhouse, 4 Drew. 329 ; 6 W. R. 823	188
Roots <i>v.</i> Dormer, 4 B. & Ad. 77 ; 1 N. & M. 667 ; 38 R. R. 231	456
Roots <i>v.</i> Snelling, 48 L. T. 216	19
Rose and Carr (not reported)	284
Rose <i>v.</i> Calland, 5 Ves. 186 ; 6 R. R. 19 n.	203
Rose <i>v.</i> Watson, 10 H. L. Ca. 672 ; 33 L. J. Ch. 385 ; 10 Jur. n.s. 297 ; 10 L. T. 106 ; 12 W. R. 585 (see, too, <i>Myers v. Watson</i>)	146
Rosenberg <i>v.</i> Cook, 8 Q. B. D. 162 ; 51 L. J. Q. B. 170 ; 30 W. R. 344	270
Rossiter <i>v.</i> Miller, 3 App. Cas. 1124 ; 48 L. J. Ch. 10 ; 39 L. T. 173 ; 26 W. R. 865	451
Routledge <i>v.</i> Grant, 4 Bing. 653 ; 1 M. & P. 717 ; 3 C. & P. 267 ; 6 L. J. o.s. C. P. 166 ; 29 R. R. 672	170
Rowe <i>v.</i> London School Board, 36 Ch. D. 619 ; 57 L. J. Ch. 179 ; 57 L. T. 182	133, 335
Rowell <i>v.</i> Satchell, (1903) 2 Ch. 212 ; 73 L. J. Ch. 20 ; 89 L. T. 267	428
Rowley <i>v.</i> Adams, 12 Beav. 476 ; 85 R. R. 144	319, 324
Royal Bristol, &c. <i>v.</i> Bomash, 35 Ch. D. 390 ; 56 L. J. Ch. 840 ; 57 L. T. 179	134, 335, 351
Rudd <i>v.</i> Lascelles, (1900) 1 Ch. 815 ; 69 L. J. Ch. 396 ; 82 L. T. 256 ; 48 W. R. 586	4, 38, 101, 107, 111, 122, 291

Russell <i>v.</i> Harford, 2 Eq. 507 ; 15 L. T. 171 ; 14 W. R. 982	PAGE 426
Russell <i>v.</i> Plaice, 18 Beav. 21 ; 23 L. J. Ch. 441 ; 22 L. T. o.s. 336 ; 18 Jur. 254 ; 2 W. R. 243 ; 2 Eq. R. 1149	203
Ryan's Estate, Re, Ir. R. 3 Eq. 255	4, 38

S

Sainsbury <i>v.</i> Jones, 5 My. & Cr. 1 ; 4 Jur. 499 ; 48 R. R. 217	136
St. Leonard's, Shoreditch, Vestry of <i>v.</i> Hughes, 17 C. B. N.S. 137 ; 33 L. J. C. P. 349 ; 10 L. T. 723 ; 12 W. R. 1106 ; 4 N. R. 465	371
St. Paul <i>v.</i> Birmingham, &c., 17 Jur. 1176 ; 11 Ha. 305 ; 21 L. T. o.s. 226 ; 1 W. R. 494	316
St. Saviour's Rectory. <i>See</i> Trustees of St. Saviour's Rectory.	
Sale <i>v.</i> Lambert, 18 Eq. 1 ; 43 L. J. Ch. 470 ; 22 W. R. 478	361, 452
Salisbury <i>v.</i> Hatcher, 2 Y. & C. C. C. 54 ; 12 L. J. Ch. 68 ; 6 Jur. 1051 ; 60 R. R. 26	312
Salvesen <i>v.</i> Rederi, &c., (1905) A. C. 302 ; 74 L. J. P. C. 96 ; 92 L. T. 575	132
Sandbach and Edmondson, (1891) 1 Ch. 99 ; 60 L. J. Ch. 60 ; 63 L. T. 797 ; 39 W. R. 193	228
Sander and Walford, 83 L. T. 316	413
Sanderson <i>v.</i> Cokermonth Ry. Co., 11 Beav. 497 ; 83 R. R. 237	9
Sansom <i>v.</i> Rhodes, 8 Seo. 544 ; 6 Bing. N. C. 261	301
Saunderson <i>v.</i> Jackson, 2 B. & P. 238 ; 3 Esp. 180	447
Savile <i>v.</i> Savile, 1 P. Wms. 745	420
Sawyer and Baring, 53 L. J. Ch. 1104 ; 51 L. T. 356 ; 33 W. R. 26	385
Saxby <i>v.</i> Thomas, 63 L. T. 695 (64 <i>ib.</i> 65)	271
Sayers <i>v.</i> Collyer, 28 Ch. D. 103 ; 54 L. J. Ch. 1 ; 51 L. T. 723 ; 33 W. R. 91	137
Schneider <i>v.</i> Heath, 3 Camp. 506 ; 14 R. R. 825	24
Schneider <i>v.</i> Norris, 2 M. & S. 286	447
School Board for London and Foster, 87 L. T. 700	45, 377
Schreiber <i>v.</i> Dinkel, 54 L. T. 911	135, 353
Scott and Alvarez, (1895) 1 Ch. 596 ; (1895) 2 Ch. 603 ; 64 L. J. Ch. 821 ; 73 L. T. 43 ; 43 W. R. 694	158, 198, 215, 219, 234, 235, 237, 271, 272, 288, 359, 418
Scott and Eave, 86 L. T. 617	269, 383
Scott <i>v.</i> Coulson, (1903) 1 Ch. 453 ; 72 L. J. Ch. 600 ; 88 L. T. 653	58
Scott <i>v.</i> Hanson, 1 Russ. & My. 128 ; 5 L. J. o.s. Ch. 67 ; 27 R. R. 141	15, 86
Scott <i>v.</i> Jackman, 21 Beav. 110	429
Scott <i>v.</i> Nixon, 3 Dru. & War. 38	194, 256
Seaman <i>v.</i> Vawdrey, 16 Ves. 399 ; 10 R. R. 207	107, 118, 119
Seaton <i>v.</i> Mapp, 2 Coll. 556 ; 70 R. R. 324	40, 160, 240, 302
Seddon <i>v.</i> North-Eastern Salt, &c., (1905) 1 Ch. 326 ; 74 L. J. Ch. 199 ; 91 L. T. 793 ; 53 W. R. 232	14, 152
Sellick <i>v.</i> Trevor, 11 M. & W. 722 ; 12 L. J. Ex. 401 ; 1 L. T. o.s. 289 ; 63 R. R. 731	225, 257
Seton <i>v.</i> Slade, 7 Ves. 265 ; 6 R. R. 124	87, 90, 264, 309, 446

	PAGE
Shackleton <i>v.</i> Sutcliffe, 1 De G. & S. 609 ; 12 Jur. 199 ; 75 R. R. 216 25, 34, 69, 85, 92, 94, 286, 287	
Shardlow <i>v.</i> Cotterell, 20 Ch. D. 90 ; 51 L. J. Ch. 353 ; 45 L. T. 572 ; 30 W. R. 143	454, 456
Sharman <i>v.</i> Brandt, L. R. 6 Q. B. 720 ; 40 L. J. Q. B. 312 ; 19 W. R. 936	448
Sharp <i>v.</i> Adcock, 4 Russ. 374	210
Shaw <i>v.</i> Foster, L. R. 5 H. L. 321 ; 42 L. J. Ch. 9 ; 27 L. T. 281 ; 20 W. R. 907	341
Sheerness Waterworks Co. <i>v.</i> Polson, 3 D. F. & J. 36 ; 30 L. J. Ch. 326 ; 4 L. T. 568 ; 7 Jur. n.s. 12 ; 9 W. R. 113	257
Sheffield <i>v.</i> Mulgrave, 2 Ves. jun. 526	210
Shepherd <i>v.</i> Keatley, 1 C. M. & R. 117 ; 4 Tyr. 571 ; 3 L. J. Ex. 288 ; 40 R. R. 504	217, 218
Sheppard <i>v.</i> Doolan, 3 D. u. & War. 1	204
Sherry <i>v.</i> Oke, 3 Dowl. 349 ; 1 H. & W. 119	134
Sherwin <i>v.</i> Shakspear, 5 D. M. & G. 517 ; 23 L. J. Ch. 177, 898 ; 21 L. T. 252 ; 18 Jur. 843 ; 2 W. R. 668	263, 319, 320, 324, 340, 341, 342
Sherwood <i>v.</i> Robins, Moo. & Mal. 194 ; 3 Car. & P. 339	93, 115, 291
Shirley <i>v.</i> Davis, cited in <i>Drewe v. Hanson</i> , 6 Ves. 678	88
Shirley <i>v.</i> Stratton, 1 Bro. C. C. 440	2, 24, 30, 88
Sibbald <i>v.</i> Lowrie, 18 Jur. 141 ; 23 L. J. Ch. 593 ; 22 L. T. o.s. 155 ; 2 Eq. R. 485 ; 2 W. R. 89	275
Sidebotham, Ex parte, 2 Mont. & A. 146 ; 3 L. J. Bkey. 122	276
Sidebottom <i>v.</i> Barrington, 3 Jur. 947 ; 5 Beav. 261 ; 52 R. R. 215	276
Sidney <i>v.</i> Clarkson, 35 Beav. 118 ; 14 W. R. 157	392, 393, 428
Sikes <i>v.</i> Wild, 4 B. & S. 421 ; 32 L. J. Q. B. 375 ; 8 L. T. 642 ; 7 Jur. n.s. 1280 ; 11 W. R. 954	136, 138
Simpson <i>v.</i> Sadd, 4 D. M. & G. 665 ; 24 L. J. Ch. 562 ; 24 L. T. o.s. 205 ; 1 Jur. n.s. 457 ; 3 W. R. 118 ; 3 Eq. Rep. 263	275
Sims <i>v.</i> Landray, (1894) 2 Ch. 318 ; 63 L. J. Ch. 535 ; 70 L. T. 530 ; 42 W. R. 621	449
Small <i>v.</i> Attwood. See <i>Attwood v. Small</i> .	
Small <i>v.</i> Torley, 25 L. R. Ir. 388	224
Smith, Re : <i>Day v. Bonaini</i> , 55 L. T. 329	444
Smith <i>v.</i> Batsford, 76 L. T. 179	306
Smith <i>v.</i> Brentnell, 1888. W. N. 69	450
Smith <i>v.</i> Butler, (1900) 1 Q. B. 694 ; 69 L. J. Q. B. 521 ; 82 L. T. 281 ; 48 W. R. 583	311
Smith <i>v.</i> Capron, 7 Ha. 185 ; 19 L. J. Ch. 322 ; 14 Jur. 687 ; 82 R. R. 60	248
Smith <i>v.</i> Chadwick, 9 App. Ca. 187 ; 51 L. J. Ch. 597	12, 40, 67, 73, 77
Smith <i>v.</i> Chichester, 2 Dru. & War. 393 ; 59 R. R. 746	403
Smith <i>v.</i> Clarke, 12 Ves. 477 ; 8 R. R. 359	164, 165, 168
Smith <i>v.</i> Death, 5 Mad. 371 ; 21 R. R. 314	192, 195
Smith <i>v.</i> Egmont. See <i>Egmont v. Smith</i> .	
Smith <i>v.</i> Ellis, 14 Jur. 682 ; 15 L. T. o.s. 451	257
Smith <i>v.</i> Garland, 2 Mer. 123 ; 16 R. R. 154	202
Smith <i>v.</i> Harrison, 26 L. J. Ch. 412 ; 29 L. T. o.s. 11 ; 5 W. R. 408 ; 3 Jur. n.s. 287	236

Smith <i>v.</i> Hughes, L. R. 6 Q. B. 597 ; 40 L. J. Q. B. 221 ; 25 L. T.	
229 ; 19 W. R. 1049	30, 54
Smith <i>v.</i> Jackson, 1 Mad. 618 ; 16 R. R. 279	127, 173
Smith <i>v.</i> Land Corporation, 28 Ch. D. 7 ; 51 L. T. 718	15, 17, 22, 73
Smith <i>v.</i> Peters, 20 Eq. 511 ; 44 L. J. Ch. 613 ; 23 W. R. 783	181, 182
Smith <i>v.</i> Robinson, 13 Ch. D. 148 ; 49 L. J. Ch. 20 ; 41 L. T. 405 ;	
28 W. R. 37	66, 216, 219
Smith <i>v.</i> Tolcher, 4 Russ. 302 ; 28 R. R. 103	79, 90, 91
Smith <i>v.</i> Wallace, (1895) 1 Ch. 385 ; 64 L. J. Ch. 240 ; 71 L. T. 814 ;	
43 W. R. 539	373, 374
Smith <i>v.</i> Watts, 4 Drew. 338 ; 28 L. J. Ch. 220 ; 32 L. T. 190 ; 7 W. R.	
126	18, 26, 229, 436
Smith <i>v.</i> Webster, 3 Ch. D. 49 ; 45 L. J. Ch. 528 ; 34 L. T. 479 ; 24 W. R.	
894	449
Smith <i>v.</i> Wheatcroft, 9 Ch. D. 223 ; 47 L. J. Ch. 745 ; 39 L. T. 103 ;	
27 W. R. 42	145
Smith <i>v.</i> Wyley, 16 Jur. 1136	261, 410
Smithson <i>v.</i> Powell, 20 L. T. o.s. 105	118, 119
Snelling <i>v.</i> Thomas, 17 Eq. 303 ; 43 L. J. Ch. 506	150
Soper <i>v.</i> Arnold, 14 App. Ca. 429 ; 59 L. J. Ch. 214 ; 61 L. T. 702 ;	
38 W. R. 449	62, 271, 418
South Staffs., &c. <i>v.</i> Sickness, &c., (1891) 1 Q. B. 402 ; 60 L. J. Q. B. 47 ;	
63 L. T. 807	<i>Add.</i>
Southby <i>v.</i> Hutt, 2 My. & Cr. 207 ; 1 Jur. 100 ; 45 R. R. 26	276, 491
Southcomb <i>v.</i> Bishop of Exeter, 6 Ha. 213 ; 11 Jur. 727 ; 16 L. J. Ch.	
378 ; 77 R. R. 86	308, 309
Sparrow and James (not reported)	382
Spedding <i>v.</i> Nevell, L. R. 4 C. P. 212 ; 38 L. J. C. P. 133	132, 133, 134
Spencer <i>v.</i> Topham, 22 Beav. 573 ; 28 L. T. o.s. 56 ; 2 Jur. n.s.	
865	195, 198
Spicer <i>v.</i> Martin, 14 App. Ca. 12 ; 58 L. J. Ch. 309 ; 60 L. T. 546 ;	
37 W. R. 689	21, 23
Spindler and Mear, (1901) 1 Ch. 908 ; 70 L. J. Ch. 420 ; 84 L. T. 295 ;	
49 W. R. 410	373
Spratt <i>v.</i> Jeffery, 10 B. & C. 249 ; 5 Man. & Ry. 188 ; 8 L. J. o.s.	
Q. B. 114	218
Spinner <i>v.</i> Walsh, 11 Ir. Eq. R. 597	51
Squire <i>v.</i> Campbell, 1 My. & Cr. 459 ; 6 L. J. Ch. 41 ; 43 R. R.	
231	47, 292
Staines <i>v.</i> Morris, 1 Ves. & B. 8	394
Stamford Banking Co. and Knight, (1900) 1 Ch. 287 ; 69 L. J. Ch. 127 ;	
81 L. T. 708 ; 48 W. R. 244	265, 410
Stanton <i>v.</i> Tattersall, 1 Sm. & G. 529 ; 17 Jur. 967 ; 21 L. T. o.s.	
333 ; 1 W. R. 502	7, 88, 89, 290
Stapylton <i>v.</i> Scott, 16 Ves. 272 ; 10 R. R. 179	191, 200
Starkey <i>v.</i> Bank of England, (1903) A. C. 114 ; 72 L. J. Ch. 402 ;	
88 L. T. 244 ; 51 W. R. 513	132
Starr-Bowkett and Sibun, 42 Ch. D. 375 ; 58 L. J. Ch. 651 ; 61 L. T.	
346 ; 38 W. R. 1	160, 365, 366, 369
Steele <i>v.</i> Waller, 28 Beav. 466 ; 3 L. T. 74 ; 6 Jur. n.s. 1004	379
Steer <i>v.</i> Crowley, 14 C. B. n.s. 337 ; 32 L. J. C. P. 191 ; 9 Jur. n.s.	
1292 ; 11 W. R. 861 ; 2 N. R. 128	267

	PAGE
<i>Stephens v. Hotham</i> , 1 K. & J. 571 ; 24 L. J. Ch. 665 ; 1 Jur. n.s. 842 ; 3 W. R. 340	392, 396
<i>Stevens v. Adamson</i> , 2 Starkie, 422	38
<i>Stevens v. Austin</i> , 3 Ell. & Ell. 685 ; 30 L. J. Q. B. 212 ; 3 L. T. 810 ; 7 Jur. n.s. 873	198
<i>Stevens v. Guppy</i> , 2 S. & St. 439 ; 6 L. J. o.s. Ch. 164	406
<i>Stewart v. Alliston</i> , 1 Mer. 26 ; 15 R. R. 81	74, 93, 288, 290
<i>Stewart v. Conyngham</i> , 1 Ir. Ch. R. 534	81, 89
<i>Stock v. Meakin</i> , (1900) 1 Ch. 683 ; 69 L. J. Ch. 401 ; 82 L. T. 248 ; 48 W. R. 420	346, 347
<i>Storer v. G. W. R.</i> , 2 Y. & C. C. C. 48 ; 12 L. J. Ch. 65 ; 60 R. R. 23.	9
<i>Storry v. Walsh</i> , 18 Beav. 559 ; 23 L. T. o.s. 35 ; 18 Jur. 503 ; 2 W. R. 300	319
<i>Stott and Rust</i> (not reported)	302
<i>Stowell v. Robinson</i> , 3 Bing. N. C. 928 ; 6 L. J. C. P. 326 ; 1 Jur. 8 ; 43 R. R. 861	311
<i>Strafford and Maples</i> , (1896) 1 Ch. 235 ; 65 L. J. Ch. 124 ; 73 L. T. 586 ; 44 W. R. 259	321
<i>Strangways v. Bishop</i> , 29 L. T. o.s. 120	16, 25, 27, 28
<i>Stranks v. St. John</i> , L. R. 2 C. P. 376 ; 36 L. J. C. P. 118 ; 16 L. T. 283 ; 15 W. R. 678	186
<i>Strickland v. Turner</i> , 7 Ex. 208 ; 22 L. J. Ex. 115	58
<i>Strong v. Strong</i> , 6 W. R. 455 ; 4 Jur. n.s. 943	430
<i>Stronge v. Hawkes</i> , 2 Jur. n.s. 388 ; 27 L. T. o.s. 150 ; 4 M. & G. 186 ; 4 De G. & J. 632	413
<i>Stuart and Olivant and Seadon</i> , (1896) 2 Ch. 328 ; 65 L. J. Ch. 576 ; 74 L. T. 450	409
<i>Stuart, Ex parte</i> , 2 Rose, 215	406
<i>Summerson, Re</i> , (1900) 1 Ch. 112 n.	193
<i>Swaishand v. Dearsley</i> , 29 Beav. 430 ; 30 L. J. Ch. 652 ; 4 L. T. 432 ; 7 Jur. n.s. 984 ; 9 W. R. 526	40, 41, 140, 148
<i>Swansborough v. Coventry</i> , 9 Bing. 305 ; 2 M. & Sc. 362 ; 2 L. J. C. P. 11 ; 35 R. R. 660	8
<i>Sweet v. Lee</i> , 3 Man. & Gr. 452 ; 4 Sc. N. R. 77 ; 5 Jur. 1134	447
<i>Sweet v. Meredith</i> , 3 Gif. 610 ; 8 Jur. n.s. 637 ; 31 L. J. Ch. 817 ; 6 L. T. 413 ; 10 W. R. 402	274
<i>Sweetland v. Smith</i> , 1 Cr. & M. 585 ; 3 Tyr. 491 ; 2 L. J. Ex. 190	317
<i>Sykes v. Giles</i> , 5 M. & W. 645 ; 9 L. T. Ex. 106	172, 316
<i>Sykes v. Sheard</i> , 2 D. J. & S. 6 ; 32 L. J. Ch. 181 ; 9 L. T. 430 ; 9 Jur. n.s. 1263 ; 12 W. R. 117 ; 3 N. R. 144	210
<i>Symons v. James</i> , 1 Y. & C. C. C. 487 ; 6 Jur. 452 ; 57 R. R. 429	160, 161, 233

T

<i>Tadeaster, &c. v. Wilson</i> , (1897) 1 Ch. 705 ; 66 L. J. Ch. 402 ; 76 L. T. 459 ; 45 W. R. 428	303, 348, 397
<i>Tamplin v. James</i> , 15 Ch. D. 215 ; 43 L. T. 520 ; 29 W. R. 311	40, 43, 52, 53, 54
<i>Tanner v. Smith</i> , 10 Sim. 410 ; 2 Hare, 109 n. ; 4 Jur. 310	268, 371, 436, 437, 438

	PAGE
Tanqueray-Willaume and Landau, 20 Ch. D. 465 ; 51 L. J. Ch. 434 ; 46 L. T. 542 ; 30 W. R. 801	208, 272
Tavistock Brewery and Gilbert (not reported).	383, 426
Taylor and Vickery (not reported)	367, 369
Taylor v. Brown, 2 Beav. 180 ; 9 L. J. Ch. 14 ; 50 R. R. 152	305
Taylor v. Martindale, 1 Y. & C. C. C. 658 ; 10 L. J. Ch. 339 ; 5 Jur. 648 ; 57 R. R. 505	40, 219, 247
Tebb, Re, 1879, W. N. 100	396
Terry and White, 32 Ch. D. 14 ; 55 L. J. Ch. 345 ; 54 L. T. 353 ; 34 W. R. 379	78, 107, 115, 280, 281, 289, 295, 357, 362
Tewart v. Lawson, 3 Sm. & G. 307 ; 2 Jur. n.s. 345 ; 4 W. R. 419	317, 319
Thackwray and Young, 40 Ch. D. 34 ; 58 L. J. Ch. 72 ; 59 L. T. 815 ; 37 W. R. 74	189, 206
The 163rd Starr-Bowkett. See Starr-Bowkett and Sibun.	
Thomas v. Brown, 1 Q. B. D. 714 ; 45 L. J. Q. B. 811 ; 35 L. T. 237 ; 24 W. R. 821	452, 459
Thomas v. Dering, 1 Keen, 729 ; 6 L. J. Ch. 267 ; 1 Jur. 211 ; 44 R. R. 158	104, 107, 113
Thomas v. Powell, 2 Cox, 394 ; 2 R. R. 86	152
Thompson and Holt, 44 Ch. D. 492 ; 59 L. J. Ch. 651 ; 62 L. T. 651 ; 38 W. R. 524	314
Thomson v. Christie, 1 Macq. 236 ; 15 Dunl. 19	424, 438
Thorne v. Heard, (1895) A. C. 495 ; 64 L. J. Ch. 652 ; 73 L. T. 291 ; 44 W. R. 155	65
Thornett v. Haines, 15 M. & W. 367 ; 15 L. J. Ex. 230	166, 167
Thurlow v. Mackeson, L. R. 4 Q. B. 97 ; 38 L. J. Q. B. 57 ; 19 L. T. 448 ; 17 W. R. 280	441
Tibbatts v. Boulton, 73 L. T. 534	277
Tildesley v. Clarkson, 30 Beav. 419 ; 8 Jur. n.s. 163 ; 31 L. J. Ch. 362 ; 6 L. T. 98 ; 10 W. R. 328	9, 35
Tilley v. Thomas, 3 Ch. 61 ; 17 L. T. 422 ; 16 W. R. 166	264, 300, 301, 304, 308, 334
Tilsley, Ex parte, 4 Mad. 227 n.	88
Todd v. Gee, 17 Ves. 273 ; 1 Swa. 255 ; 18 R. R. 70	97
Tomlin v. Luce, 43 Ch. D. 191 ; 59 L. J. Ch. 164 ; 62 L. T. 18 ; 38 W. R. 323	106, 438
Torrance v. Bolton, 8 Ch. 118 ; 42 L. J. Ch. 177 ; 27 L. T. 738 ; 21 W. R. 134	38, 49, 60, 67, 69, 127, 128, 156, 157, 227, 230, 247
Touret v. Cripps, 48 L. J. Ch. 567 ; 27 W. R. 706	447
Tourville v. Naish, 3 P. Wms. 306	153
Towle v. Topham, 37 L. T. 308	451
Townshend v. Granger, 9 L. J. o.s. Ch. 176	109
Townshend v. Stangroom, 6 Ves. 328 ; 5 R. R. 312	140, 141, 144
Townshend v. Townshend, 2 Russ. 303	328
Trower v. Newcome, 3 Mer. 704 ; 17 R. R. 171	6, 18
Trustees of Hollis' Hospital. See Hollis' Hospital.	
Trustees of St. Saviour's Rectory and Oyler, 31 Ch. D. 412 ; 54 L. T. 9	216
Tubb v. Wynne, (1897) 1 Q. B. 74 ; 66 L. J. Q. B. 116.	344, 345
Tucke v. Vowles, (1893) 1 Ch. 195 ; 62 L. J. Ch. 172 ; 67 L. T. 763 ; 41 W. R. 156	47, 428

	PAGE
Tunstill <i>v.</i> Bottrill, 5 B. & Ad. 131	238
Turner and Skelton, 13 Ch. D. 130 ; 49 L. J. Ch. 114 ; 41 L. T. 668 ; 28 W. R. 312	107, 159, 291, 292
Turner <i>v.</i> Marriott, 3 Eq. 744 ; 15 L. T. 607 ; 15 W. R. 420	127, 128
Turner <i>v.</i> Turner, 1881, W. N. 70	87
Turner <i>v.</i> West Bromwich Union, 3 L. T. o.s. 662 ; 9 W. R. 155.	62, 82, 402
Turpin <i>v.</i> Chambers, 29 Beav. 104 ; 30 L. J. Ch. 470 ; 7 Jur. N.S. 459 ; 9 W. R. 363	370
Turquand <i>v.</i> Rhodes, 37 L. J. Ch. 830 ; 18 L. T. 844 ; 16 W. R. 1074	254
Tweed <i>v.</i> Mills, L. R. 1 C. P. 39	237
Twining <i>v.</i> Morrice, 2 Bro. C. C. 326	82
Tyrconnel <i>v.</i> Ancaster, 2 Ves. sen. 500	2
Tyrell, Re, 82 L. T. 675	57

C

Union Bank <i>v.</i> Munster, 37 Ch. D. 51 ; 57 L. J. Ch. 124 ; 57 L. T. 877 ; 36 W. R. 72	169
Upperton <i>v.</i> Nickolson, 6 Ch. 436 ; 40 L. J. Ch. 401 ; 25 L. T. 4 ; 19 W. R. 733	82, 91, 264, 268

V

Van <i>v.</i> Corpe, 3 My. & K. 269 ; 6 L. J. Ch. 208 ; 1 Jur. 149	13, 28
Vancouver <i>v.</i> Bliss, 11 Ves. 458 ; 8 R. R. 207	91
Van Praagh <i>v.</i> Everidge, (1902) 2 Ch. 266	53
Van Praagh <i>v.</i> Everidge, <i>S. C.</i> reversed on other grounds, (1903) 1 Ch. 434 ; 72 L. J. Ch. 260 ; 88 L. T. 249	450, 454
Vansittart, Re, (1893) 2 Q. B. 377 ; 62 L. J. Q. B. 279 ; 68 L. T. 233 ; 41 W. R. 286	194
Vaughan <i>v.</i> Magill, 12 Ir. Eq. R. 207	248
Venn and Furze, (1894) 2 Ch. 101 ; 63 L. J. Ch. 303 ; 70 L. T. 312 ; 42 W. R. 440	197
Venn <i>v.</i> Cattell, 27 L. T. 469	263
Verrell's Contract, (1903) 1 Ch. 65 ; 72 L. J. Ch. 44 ; 87 L. T. 521	198
Vestry of St. Leonard's, Shoreditch <i>v.</i> Hughes. <i>See</i> St. Leonard's, Shoreditch (Vestry of) <i>v.</i> Hughes.	
Vezey <i>v.</i> Rashleigh, (1904) 1 Ch. 634 ; 73 L. J. Ch. 422 ; 90 L. T. 663 ; 52 W. R. 442	150
Vickers <i>v.</i> Hand, 26 Beav. 630	319, 320, 331
Vickers <i>v.</i> Vickers, 4 Eq. 529 ; 30 L. J. Ch. 946	180
Vignolles <i>v.</i> Bowen, 12 Ir. Eq. R. 194	41, 42, 248
Vonhollen <i>v.</i> Knowles, 12 M. & W. 602	381
Vouillon <i>v.</i> States, 25 L. J. Ch. 875 ; 27 L. T. o.s. 268 ; 2 Jur. N.S. 845	144
Vowles <i>v.</i> Bristol Bldg. Soc., 44 Sol. J. 592	364

W

PAGE

Waddell <i>v.</i> Wolfe, L. R. 9 Q. B. 515 ; 43 L. J. Q. B. 139 ; 23 W. R. 44	216, 218
Wakeman <i>v.</i> Rutland, 3 Ves. 233, 504 ; 8 Bro. P. C. 145	388
Walker and Oakshott, (1901) 2 Ch. 383 ; 70 L. J. Ch. 666 ; 84 L. T. 809 ; 50 W. R. 41	128, 439
Walker <i>v.</i> Moore, 10 B. & C. 416 ; 8 L. J. o.s. K. B. 159	130, 135, 136
Wall <i>v.</i> City of London Real Property Co., L. R. 9 Q. B. 249 ; 43 L. J. Q. B. 249 ; 30 L. T. 53	132
Wallis and Barnard, (1899) 2 Ch. 515 ; 68 L. J. Ch. 753 ; 81 L. T. 382 ; 48 W. R. 57	128, 187, 378, 384, 391
Wallis and Grout, (1906) 2 Ch. 206 ; 75 L. J. Ch. 519 ; 94 L. T. 814 ; 54 W. R. 534	256
Wallis <i>v.</i> Bastard, 4 D. M. & G. 251 ; 17 Jur. 1107 ; 22 L. T. 162 ; 2 W. R. 47 ; 2 Eq. R. 508	328
Wallis <i>v.</i> Smith, 21 Ch. D. 243 ; 21 L. J. Ch. 145 ; 47 L. T. 389 ; 31 W. R. 214	419, 422, 423
Walter <i>v.</i> Maunde, 1 Jac. & W. 181 ; 21 R. R. 141	248
Want <i>v.</i> Stallibrass, L. R. 8 Ex. 175 ; 42 L. J. Ex. 108 ; 27 L. T. 293 ; 21 W. R. 685	266, 270, 271
Ward and Jordan, (1902) 1 L. R. 73	398
Ward <i>v.</i> Ghymes, 9 Jur. n.s. 1097 ; 8 L. T. 782 ; 11 W. R. 794	267, 268
Warde <i>v.</i> Dixon (or Dickson), 28 L. J. Ch. 315 ; 32 L. T. o.s. 349 ; 5 Jur. n.s. 698 ; 7 W. R. 148	35, 201, 268, 372
Waring <i>v.</i> Hoggart, Ry. & M. 39 ; 27 R. R. 728	39, 288
Waring <i>v.</i> Scotland, 59 L. T. 132 ; 36 W. R. 756	41
Waring <i>v.</i> Ward, 7 Ves. 332 ; 5 R. R. 130	390
Warlow <i>v.</i> Harrison, 1 E. & E. 295 ; 29 L. J. Q. B. 14 ; 32 L. T. o.s. 222 ; 6 Jur. n.s. 66 ; 7 W. R. 133	167
Warner <i>v.</i> Jacob, 20 Ch. D. 220 ; 51 L. J. Ch. 642 ; 40 L. T. 656 ; 30 W. R. 731	440
Warren <i>v.</i> Richardson, You. 1 ; 34 R. R. 251	271, 277
Waters <i>v.</i> Waters, 36 L. J. Ch. 195 ; 15 L. T. 406 ; 15 W. R. 191	265
Watson <i>v.</i> Marston, 4 D. M. & G. 230	161, 377
Watson <i>v.</i> Reid, 1 Russ. & My. 236 ; 32 R. R. 203.	309
Wauton <i>v.</i> Coppard, (1899) 1 Ch. 92 ; 68 L. J. Ch. 8 ; 79 L. T. 467 ; 47 W. R. 72	20, 147
Webb <i>v.</i> Hughes, 10 Eq. 281 ; 39 L. J. Ch. 606 ; 18 W. R. 749	304, 308
Webb <i>v.</i> Kirby, 7 D. M. & G. 376	380
Webb <i>v.</i> Smith, 30 Ch. D. 192 ; 55 L. J. Ch. 343 ; 53 L. T. 737	174
Webster <i>v.</i> Cecil, 30 Beav. 62	56
Webster <i>v.</i> Donaldson, 11 Jur. n.s. 404 ; 34 Beav. 451 ; 12 L. T. 69 ; 13 W. R. 515	338
Wedgwood <i>v.</i> Adams, 8 Beav. 103	95, 97
Weekes <i>v.</i> Gallard, 21 L. T. 655 ; 18 W. R. 331	179
Weir <i>v.</i> Bell, 3 Ex. D. 238	65
Weller <i>v.</i> Stearns, 1870, W. N. 128	395
Wellings and Parsons (not yet reported)	Add.
Wells <i>v.</i> Maxwell, 32 Beav. 408 ; 33 L. J. Ch. 44 ; 8 L. T. 591 ; 9 Jur. n.s. 1021 ; 11 W. R. 842	302, 304, 306
West <i>v.</i> Wild, 3 L. J. o.s. Ch. 15	386, 390

	PAGE
West London Commercial Bank <i>v.</i> Kitson, 13 Q. B. D. 360 ; 53 L. J. Q. B. 345 ; 50 L. T. 656 ; 32 W. R. 757	64
West of England Fire Insee. <i>v.</i> Isaacs, (1897) 1 Q. B. 226 ; 66 L. J. Q. B. 36 ; 75 L. T. 564	348, 349
Western <i>v.</i> Russell, 3 Ves. & B. 187 ; 13 R. R. 178	106
Western Bank of Scotland <i>v.</i> Addie, L. R. 1 H. L. Sc. 145	61
Westmacott <i>v.</i> Robins, 4 D. F. & J. 390	122, 127, 128
Westminster Fire Office <i>v.</i> Glasgow Provident, 13 App. Ca. 699 ; 59 L. T. 641	349
Weston and Thomas, 1907, W. N. 21	Add.
Weston <i>v.</i> Savage, 10 Ch. D. 736 ; 48 L. J. Ch. 239 ; 27 W. R. 654	39, 303, 311
Wheate <i>v.</i> Hall, 17 Ves. 80	209
Wheatley <i>v.</i> Slade, 4 Sim. 126 ; 33 R. R. 100	101
Wheeler <i>v.</i> Collier, M. & M. 123	168
Whitbread <i>v.</i> Brockhurst, 1 Bro. C. C. 404	457, 458
Whitbread <i>v.</i> Watt, (1902) 1 Ch. 835 ; 71 L. J. Ch. 424 . 86 L. T. 395 ; 50 W. R. 442	127
White and Hindle, 7 Ch. D. 201 ; 47 L. J. Ch. 85 ; 26 W. R. 124	203
White and Smith, (1896) 1 Ch. 637 ; 65 L. J. Ch. 481 ; 74 L. T. 377 ; 44 W. R. 424	249, 250
White <i>v.</i> Bradshaw, 16 Jur. 738 ; 18 L. T. o.s. 183	6, 53
White <i>v.</i> Cuddon, 8 Cl. & F. 766 ; 6 Jur. 471 ; 54 R. R. 176	8, 74, 105, 107, 118, 437
White <i>v.</i> Hay, 72 L. T. 281	312, 398
Whitehouse <i>v.</i> Hugh, (1906) 2 Ch. 283 ; 75 L. J. Ch. 154 ; 95 L. T. 175 ; (affirming 54 W. R. 294)	45
Whiteley <i>v.</i> Taylor, 35 L. T. 187	221, 257, 412
Whiting to Loomes, 17 Ch. D. 10 ; 50 L. J. Ch. 463 ; 44 L. T. n.s. 718 ; 29 W. R. 435	261
Whittemore <i>v.</i> Whittemore, 8 Eq. 603 ; 38 L. J. Ch. 17 ; 19 L. T. 236	76, 280, 297
Whittington <i>v.</i> Corder, 16 Jur. 1034 ; 20 L. T. o.s. 175 ; 1 W. R. 30	39, 50, 186
Whitwham <i>v.</i> Westminster, &c., (1896) 2 Ch. 538 ; 65 L. J. Ch. 741 ; 74 L. T. 804 ; 44 W. R. 698	352
Wiggins <i>v.</i> Lord, 4 Beav. 30 ; 2 Jur. n.s. 786 ; 55 R. R. 5	172
Wilde <i>v.</i> Gib-on, 1 H. L. C. 605 ; 12 Jur. 527. <i>And see</i> Gibson <i>v.</i> D'Este	152, 153
Wilkins <i>v.</i> Fry, 1 Mer. 244 ; 15 R. R. 110	394, 439
Wilkinson <i>v.</i> Castle. <i>See</i> Castle <i>v.</i> Wilkinson.	
Wilkinson <i>v.</i> Hartley, 15 Beav. 183	380
Willett and Argenti, 60 L. T. 735	410, 413
Williams and Duchess of Newcastle, (1897) 2 Ch. 144 ; 66 L. J. Ch. 543 ; 76 L. T. 646 ; 45 W. R. 627	403
Williams and Parry, 72 L. T. 869	257
Williams <i>v.</i> Edwards, 2 Sim. 78 ; 29 R. R. 61	270, 359, 363, 364
Williams <i>v.</i> Evans, L. R. 1 Q. B. 352 ; 35 L. J. Ch. 111 ; 13 L. T. 753 ; 14 W. R. 330	172
Williams <i>v.</i> Glenton, 1 Ch. 200 ; 13 L. T. 727 ; 14 W. R. 294 ; 12 Jur. n.s. 175	191, 317, 318, 319, 329, 330, 331

	PAGE
Williams v. Lake, 2 E. & E. 349 ; 29 L. J. Q. B. 1 ; 1 L. T. 56 ; 6 Jur. n.s. 45.	450
Williams v. Scott, (1900) A. C. 499 ; 69 L. J. P. C. 77 ; 82 L. T. 727	199
Williams v. Shaw, 3 Russ. 178 n.	337
Williams v. Spargo, 1893, W. N. 100	238
Williams v. Wood, 16 W. R. 1005	231
Williamson v. Williamson, 9 Ch. 729	395, 396
Willmott v. Barber, 15 Ch. D. 96 ; 49 L. J. Ch. 792 ; 43 L. T. 95 ; 28 W. R. 911	97
Wills v. Stradling, 3 Ves. 378 ; 4 R. R. 26	457
Willson v. Love, (1896) 1 Q. B. 626 ; 65 L. J. Q. B. 474 ; 74 L. T. 580 ; 44 W. R. 450	423
Wilmot v. Wilkinson, 6 B. & C. 506 ; 9 D. & R. 620 ; 5 L. J. o.s. K. B. 196 ; 30 R. R. 405	220
Wilson v. Clapham, 1 Jac. & W. 36 ; 20 R. R. 213	341
Wilson v. Finch-Hatton, 2 Ex. D. 336 ; 46 L. J. Ex. 489 ; 36 L. T. 473 ; 25 W. R. 537	9
Wilson v. Fuller, 3 Q. B. 68 ; 3 G. & D. 570	64, 70
Wilson v. Greene. See Carus-Wilson and Greene.	
Wilson v. West Hartlepool Rail. Co., 2 D. J. & S. 475	458
Wilson v. Williams, 3 Jur. n.s. 810	114, 123
Wilsons and Stevens, (1894) 3 Ch. 546 ; 63 L. J. Ch. 863 ; 71 L. T. 388 ; 43 W. R. 23	138, 321, 335
Wiltshire v. Cottrell, 1 E. & B. 674 ; 22 L. J. Q. B. 177 ; 17 Jur. 758	178
Winch v. Winchester, 1 Ves. & B. 375 ; 12 R. R. 238	4, 144
Winter v. Blades, 2 Sim. & St. 393 ; 4 L. J. o.s. Ch. 81 ; 25 R. R. 236	330
Winterbottom v. Ingham, 7 Q. B. 611 ; 14 L. J. Q. B. 298 ; 10 Jur. 4 ; 68 R. R. 522	337
Wise v. Piper, 13 Ch. D. 848 ; 49 L. J. Ch. 611 ; 41 L. T. 794 ; 28 W. R. 442	209
Withy v. Cottle, T. & R. 78 ; 1 Sim. & St. 174 ; 23 R. R. 187	303
Wix v. Ruston, (1899) 1 Q. B. 474 ; 68 L. J. Q. B. 298 ; 80 L. T. 168	345
Wood v. Bernal, 19 Ves. 220 ; 12 R. R. 173	91, 125
Wood v. Griffith, 1 Swa. 43 ; 1 Wilson, Ch. 34 ; 18 R. R. 18	106
Wood v. Keep, 1 F. & F. 331	280
Woods and Lewis, (1898) 2 Ch. 211 ; 67 L. J. Ch. 475 ; 78 L. T. 665	323, 413
Woods v. Martin, 11 Ir. Ch. R. 148	153
Woodward v. Miller, 2 Coll. 279 ; 16 L. J. Ch. 16 ; 6 L. T. o.s. 167 ; 9 Jur. 1003	168
Woolcott v. Pegg, 15 App. Ca. 42 ; 59 L. J. P. C. 44 ; 61 L. T. 845 ; 38 W. R. 465	365
Woollam v. Hearn, 7 Ves. 211 ; 6 R. R. 113	144
Worley v. Frampton, 5 Ha. 560 ; 16 L. J. Ch. 102 ; 10 Jur. 1092 ; 71 R. R. 224	387, 389
Worthington v. Warrington, 8 C. B. 134 ; 18 L. J. C. P. 350 ; 79 R. R. 425	135, 353
Wright v. Griffith, 1 Ir. Ch. R. 695	220
Wright v. Wilson, 1 Moo. & R. 207	45, 288

	PAGE
Wylson <i>v.</i> Dunn, 34 Ch. D. 569 ; 56 L. J. Ch. 855 ; 56 L. T. 192 ; 35 W. R. 405	310, 312
Wyman <i>v.</i> Carter, 12 Eq. 309 ; 40 L. J. Ch. 559	207
Wythes <i>v.</i> Lee, 3 Drew. 396 ; 25 L. J. Ch. 177 ; 26 L. T. O.S. 192 ; 2 Jur. N.S. 7 ; 4 W. R. 184	127

Y

Yates, Re, 38 Ch. D. 112 ; 57 L. J. Ch. 697 ; 59 L. T. 47 ; 36 W. R. 563	441
Yates <i>v.</i> Gardiner, 20 L. J. Ex. 327	315
Yeilding and Westbrook, 31 Ch. D. 344 ; 55 L. J. Ch. 496 ; 54 L. T. 531 ; 34 W. R. 397	138
Young and Harston, 31 Ch. D. 168 ; 54 L. J. Ch. 1144 ; 53 L. T. 837 ; 34 W. R. 84	320, 321, 324

ABBREVIATIONS

Brickdale and Sheldon	Brickdale and Sheldon's Land Transfer Acts (2nd ed.), 1905.
Dan. Ch. Pr.	Daniel's Chancery Practice (7th ed.), 1901.
Dart	Dart on Vendor and Purchaser (7th ed.), 1905.
Dav. or Davidson	Davidson's Precedents and Forms in Conveyancing (4th ed.), 1874.
Farrar	Farrar's Precedents of Conditions of Sale, 1902.
Fry Sp. Perf.	Fry on Specific Performance (3rd ed.), 1892.
Key and Elph.	Key and Elphinstone's Compendium of Precedents in Conveyancing.
R. S. C.	Rules of the Supreme Court.
Seton	Seton on Judgments (6th ed.), 1901.

ADDENDA

- P. 3, *after* paragraph marked 'Boundaries,' *add*: Where a corner plot of building land has two frontages and a rounded corner, the description 'having a frontage on road A of 133 feet, with a depth of 124 feet along road B,' means that the purchaser will get a total frontage of 257 feet measured round the bend, not that the lines of frontage, if produced in straight lines to their point of intersection, will measure 133 feet and 124 feet respectively: *Wellings and Parsons*, Kekewich, J., 6 Dec. 1906. No evidence was given in that case as to the practice of surveyors.
- P. 125, at foot, *add*: In the case of *Weston and Thomas*, 1907, W. N. 21, Eady, J., held that the purchaser could not be compelled to accept a personal covenant of indemnity for the payment of a trifling amount of succession duty, which might become payable thirty years after the contract.
- P. 209, at end of second paragraph, *add*: As to the points of law referred to in these cases, see *Official Receiver v. Cooke*, (1906) 2 Ch. 661.
- P. 313, *before* last paragraph, *add*: But where a trustee who had the legal estate was selling at the written request of all the beneficiaries given him before the contract was entered into, the purchaser was held bound to take a title from the beneficiaries, although the trustee did not purport to sell as agent, but under a trust for sale or power of sale (which did not, in fact, exist), and there was no statement that the beneficiaries would concur, except this: 'the tenant for life shall join in the conveyance for the purpose of releasing her life interest': *Baker and Selmon*, not yet reported, except in 122 L. T. Newspaper, p. 273, and 1907, W. N. 22.
- P. 321, *after* fourth paragraph, *add*: Where a house in the occupation of a tenant was sold with vacant possession, it was held to be 'wilful default' for the vendor to fix a date for completion which was impossibly early, except on the assumption (which proved to be incorrect) that the tenancy was a quarterly one, an assumption which was unreasonably rash, having regard to the fact that the vendor did not know what the terms of the tenancy were, and that the tenancy had existed uninterruptedly for thirty years, and that the purchaser had called the vendor's attention to the possible difficulty as to the tenancy: *Postmaster-General and Colgan*, (1906) 1 Ir. R. 287, 477.
- P. 343, *after* fourth paragraph, *add*: The words 'up to' in a condition relating to outgoings would probably be construed as including

the day fixed for completion, and the word 'from' as excluding that day. Compare the construction of the word 'until' in a policy of fire insurance: *Isaacs v. Royal, &c.*, 1870, L. R. 5 Ex. 296. See, further, *Backhouse v. Mellor*, 1859, 4 H. & N. 116; and *South Staffs, &c. v. Sickness, &c.*, (1891) 1 Q. B. 402.

- P. 346, *after* first paragraph, *insert*: Under the Public Health (London) Act, 1891, the vendor would, it is conceived, be liable under the usual condition as to outgoing if a notice were served on him before the date fixed for completion. Under that Act the notice itself imposes a liability: *Gebhardt v. Saunders*, (1892) 2 Q. B., at p. 457 (a case of landlord and tenant). The distinction drawn in *Allen and Driscoll*, (1904) 2 Ch., at p. 231, between an order and a notice would not apply in this case. It might be argued that the date at which the time fixed by the notice expired was the date to be considered, as the person served has not made default and not become liable for any penalty until the expiration of the notice. It is, however, submitted that a duty is imposed by the serving of the notice and an inchoate liability is incurred, and that the date of the service of the notice is the crucial date.
- P. 367, *add*: On a sale expressly 'free from incumbrances' the vendor is not entitled to rescind on the ground of unwillingness to commute and pay in advance the additional succession duty which will become payable many years hence when the lease of the property falls in, in case the vendors are then living: *Weston and Thomas*, not yet reported, except in 1907, W. N. 21.
- P. 369, at end of paragraph 2, *add*: And a notice of rescission contained in a letter written 'without prejudice' is not a valid notice: *Weston and Thomas*, 1907, W. N. 21.

PARTICULARS AND CONDITIONS OF SALE

PART I

Particulars of Sale and the Purchaser's Remedies for a Misdescription by the Vendor

CHAPTER I

MISDESCRIPTION

ON a sale of land, it is the duty of the vendor to describe the property accurately and in unambiguous language, to make no misstatements concerning it, and to mention any latent defects in it, or any incumbrances affecting it which he does not intend to pay off.

The following are some instances of misdescription :

Examples of
misdescription.

Four undivided sevenths of seven acres described as "four acres" : *Re Arnold*, 1880, 14 Ch. D. 270.

Redeemed land tax, consisting of several sums charged on separate parts of the property, described as an aggregate amount charged on the whole property : *Cox v. Coventon*, 1862, 31 Beav. 378.

"A valuable tavern lot," where a covenant prohibited user otherwise than as a private dwelling-house or shop : *Coombs v. Cook*, 1883, 1 Cab. & Ell. 75.

"Free public house," where the lease contained covenants to take beer from the lessor : *Jones v. Edney*, 1813, 3 Camp. 285.

"Public house," where there was only an off-licence : see

Pease v. Coats, 1866, 2 Eq. 688 (a case on the construction of a covenant).

"Similar houses," where the houses differed in having no entrance halls, and in having privies instead of w.c.'s : *Hare and O'More*, (1901) 1 Ch. 93.

"Clear rent." "Clear yearly rent," as between vendor and purchaser, means a rent clear of all outgoing and incumbrances, except those (such as land tax) which are usually, or by local custom, borne by the landlord : per Lord Hardwicke in *Tyreconnel v. Ancaster*, 1754, 2 Ves. sen. at p. 504. And a representation that the estate "clears a net value of 90*l.* per annum" is false if the owner has to spend 50*l.* per annum in repairing a sea wall : *Shirley v. Stratton*, 1785, 1 Bro. C. C. 440.

"Annual rental" means gross annual rental : Chitty, J., in *Edwards to Daniel Sykes, &c.*, 1890, 62 L. T. 445.

"Ground rent" is the sum paid by the owner or builder of houses for the use of land to build on, and is, therefore, much under what it lets for when it has been built on : *Bartlett v. Salmon*, 1855, 6 D. M. & G. 33. It is, of course, a misdescription to use the words "freehold ground rent" in describing a sum in gross paid for the right to use land as a garden : *Robins v. Evans*, 1863, 2 H. & C. 410.

"Rent-charge" is a correct description of any rent for which there is a power of distress under 4 Geo. II. c. 8 : *Gerard and Beecham*, (1894) 3 Ch. 295.

"Apportioned rent" is a misdescription, if the rent has not been legally apportioned—*i.e.* apportioned either by a jury or by both landlord and tenant : *Bliss v. Collins*, 1819, 4 Mad. 229 ; 5 B. & Ald. 876.

The words "tenant at will at a yearly rent" are a sufficiently correct description of a tenant from year to year : *Pope v. Garland*, 1841, 4 Y. & C. at p. 399.

An under-lease is incorrectly described as a "lease" : see below, p. 41.

An equity of redemption subject to a mortgage reserving interest at 5½ per cent., reducible to 4½ on punctual payment, was sold as subject to a mortgage "at 4½ per cent." ; this inaccuracy was held to disentitle the vendor to damages for the

purchaser's refusal to complete: *Brasier v. Morton* (1905, B. No. 2410), Warrington, J., May 9, 1906.

An agreement, made at the instance of the lessees, to grant a lease of a seam of coal "called the S. vein, and being about 2 feet thick," was held not to contain a representation or warranty that the seam actually existed, and specific performance was decreed, although the lessees were unable to find any coal: *Jefferys v. Fairs*, 1876, 4 Ch. D. 448. "All that the agreement amounts to is a licence to enter and search for the vein of coal and make what they could of it": Bacon, V.-C. It would, probably, have been held to be a misdescription if the vendor had advertised the land containing the seam of coal for sale under the same description, because the advertisement would imply that the seam was 2 feet thick in one part at least—*i.e.* that the seam existed.

With regard to the boundaries of property sold, it is conceived that no duty is imposed on the vendor to inform the purchaser whether a hedge or wall forming the boundary is on the vendor's land or his neighbour's land or in their joint ownership, and that, in the absence of any statement in the particulars or conditions, and of any indication given by the appearance of the property, the purchaser is not entitled to assume that the hedge is on the land sold, or that the wall is part of the property sold. Similarly, where the boundary is a road or river, it is conceived that the purchaser is not entitled to assume that he will become the owner *usque ad medium fluminae* or *fluminis*. As to inferences to be drawn from the appearance of the property, see *Denny v. Hancock*, 1870, 6 Ch. 1 (stated below, p. 44), and from the statements in the particulars, *Lindsay and Forder*, 1895, 72 L. T. 832 (p. 45 below), and *Brewer v. Brown*, 1884, 28 Ch. D. 309 (p. 90 below). If the vendor is also the owner of the adjoining property, the purchaser would probably be held entitled to assume in the absence of any reservation that a wall between the two properties will be a party-wall. Boundaries.

The words "more or less" were held not to cover a deficiency of 26 acres out of 217: *Hill v. Buckley*, 1811, 17 Ves. 394. "More or less."

But compensation was decreed for a deficiency of 2 acres

on a sale of land described as “about 186 acres”: *Calcraft v. Roebuck*, 1790, 1 Ves. jun. 221.

In *Winch v. Winchester*, 1812, 1 Ves. & B. 375, a deficiency of 5 out of 41 acres was held to be covered by the expressions “more or less” and “by estimation.”

The same expressions were held in *Portman v. Mill*, 1826, 2 Russ. 570, not to cover a deficiency of 100 acres in 349.

Property having a depth of 204 feet was described as 217 feet deep, and there was a condition that “the quantities are to be taken more or less.” The deficiency was held to be immaterial: *Lethbridge v. Kirkman*, 1855, 25 L. J. Q. B. 89.

If the quantity is given not merely in acres, but in acres, roods, and perches, the particularity of the statement would convey the notion of actual admeasurement (*Hill v. Buckley*, 1811, 17 Ves. at p. 401), and the addition of the words “more or less” could only avail to cover a very slight deficiency.

But in *Re Ryan's Estate*, 1868, Ir. R. 3 Eq. 255, the words “deduct probable amount of tithe rent-charge, 9*l.* 18*s.* 5*d.*,” though going minutely into the amount, were held to be sufficient to cover an actual rent-charge of 10*l.* 8*s.* 5*d.*, and no compensation was given to the purchaser. The demand for compensation was made after completion, but the case was not decided on that ground.

The description of property as of the “estimated” annual value of so much is not an “error or misstatement” within the condition for compensation, even if the value is not so great, provided the vendor did really estimate the value at the amount stated: *Hurlbutt and Chaytor*, 1888, 57 L. J. Ch. 421.

Misleading
statements.

A statement may be made which, though literally true, is calculated to mislead. This may happen either because it is a partial statement of facts put forward as a complete statement, or because the words used are ambiguous. Such misleading statements entitle the purchaser to relief, and may, therefore, be classed under the general head of misdescription.

The following are instances of statements literally true, but misleading in effect:

A statement that woods “produced 25*0l.* per annum on an average of the last 15 years,” the fact being that that

amount was only produced by racking the woods beyond the course of husbandry : *Lowndes v. Lane*, 1789, 2 Cox, 363.

The description of property as "let on a lease containing all the usual covenants to repair," the vendor knowing, but omitting to state, that there is no person who can be made liable upon the covenants : *Flint v. Woodin*, 1852, 9 Hare, 618, at p. 621.

The description "held for twenty-one years by lease from C., who holds upon lives under the Dean and Chapter of W., with covenants to renew the same twice twenty-one years more to make a complete term of sixty-three years," is misleading if C. is only tenant for life of the church lease, so that his covenant to renew the sub-lease is not binding on his remaindermen as such : *Milligan v. Cooke*, 1808, 16 Ves. 1.

The statement that certain cottages on the property are "in the occupation of the S. colliery or their under-tenants or workmen" is misleading if the owners of the S. colliery are entitled to occupy without paying rent : *Brandling v. Plummer*, 1854, 2 Drew. 427.

"In the occupation of C. at a rental of 42*l.*" is a misleading description if C. is not the vendor's tenant, and does not pay rent to him : *Lachlan v. Reynolds*, 1853, Kay, 52.

The description "enclosed by a wall, with a tradesman's entrance," is misleading if the wall belongs to a third person and the entrance is used on sufferance : *Brewer v. Brown*, 1884, 28 Ch. D. 309.

The description of a dwelling-house as having "a plentiful supply of good water" is misleading if the supply is intermittent, or the right to the supply is subservient to the right of another person : *Bird v. Andrew*, 1887, 4 Times L. R. 31.

The statement "the water supply is derived from a well on the adjoining premises from whence it is supplied by a force pump all over the house ; 2*s.* 6*d.* per annum is paid to the owner of the adjoining premises for the use of this well," is misleading if the user is by sufferance only : *Evershed and Campion*, Kekewich, J., 9 November, 1900.

"Well supplied with water," in the description of a warehouse (with small steam engine) situate in a district where springs abound, and factories (though not warehouses) are

usually supplied with water from wells on the premises, is a misdescription if the only water supply is from waterworks on payment of a substantial water rate (20*l.* per annum) : *Leyland v. Illingworth*, 1860, 2 De G. F. & J. 248.

An estate of seventy acres, sixty-two of which were leasehold, and only eight freehold, was described as “freehold estate, with leasehold adjoining.” The purchaser would have been relieved if he had not waived his right to complain of the description : *Fordyce v. Ford*, 1794, 4 Bro. C. C. 494.

But the statement on the sale of an advowson that the living would become vacant on the death of a person aged eighty-two, was held not to amount to a representation that the *incumbent's* age was eighty-two : *Trower v. Newcome*, 1813, 3 Mer. 704.

The representation that the property had been mortgaged for 2,000*l.* is misleading if the mortgage comprises other property, and this fact is not stated, or if the mortgagor was compelled to redeem and to pay money to the mortgagee for having represented that the property was worth 2,000*l.* : *Mullens v. Miller*, 1882, 22 Ch. D. 194, at p. 201.

A farm was described as “lately in the occupation of H., at an annual rent of 290*l.* Now in hand.” The farm had been occupied by H. for one quarter for 1*l.*, and then for one year only for 290*l.* When H. left, the vendor agreed to let it to N. for 225*l.*, but the agreement was afterwards cancelled. The statement of the rent was held to be misleading : *Dimmock v. Hallett*, 1866, 2 Ch. 21.

Correct
description
misleading.

Where the description is the usual and proper designation of the property, the purchaser cannot complain, even if he has been deceived by such description. A house was sold by the description, “No. 39, Regency Square, Brighton”; this was the usual name of the house, although the house was not in the square, but in a side street, and had no sea view. The purchaser, who had bought the house because he thought it was in the square, and so expected to have a sea view, was held to his bargain : *White v. Bradshaw*, 1851, 16 Jur. 738. But the description, “No. 58, on the north side of Pall Mall, opposite Marlborough House,” was held to be a misdescription, because, though the usual name of the house was No. 58, Pall Mall, it

did not abut on that street, being built at the back of No. 57, and communicating with the street merely by a passage about 65 feet long and 3 feet 8 inches wide : *Stanton v. Tattersall*, 1853, 1 Sm. & G. 529.

Although the property has been accurately described in the particulars, reference to another document more favourable to the purchaser may override the correct description in the particulars. Thus, reference to a lease not containing restrictions mentioned in the description of the property given by the particulars has been held to entitle the purchaser to rescind if he cannot obtain a valid and subsisting lease free from such restrictions, even though the restrictions were contained in the agreement for the lease, and ought to have been inserted in the lease itself. Thus, on the sale of a "bonded sugar refinery," reference to the lease, which did not (though the agreement for the lease did) restrict the user of the property to the refining of sugar "in bond," was held to entitle the purchaser to have the property free from this restriction, notwithstanding the word "bonded" in the particulars ; and as the lessors had filed a bill against the vendor to have the lease rectified by the insertion of the words "in bond" the purchase money, which had been paid into Court, was retained there pending the decision of the suit : *Bentley v. Craven*, 1853, 17 Beav. 204. In that case it would seem the purchaser was justified in assuming that the lease showed the legal rights of the vendor, and that the particulars merely stated the use to which the property was then being put, and were not intended to mean that the property could not be put to any other use.

Reference to
lease.

Where it is clear that a literal interpretation of a description in the particulars would contravene a general rule of law or universal custom, and the description is capable of a modified interpretation or limited application, which would make it true, the purchaser cannot complain that he was deceived by such description. Thus, where a manor was sold with the representation "the fines are arbitrary," the fact being that the fines in respect of freebench were certain, but all other fines arbitrary, there was no misdescription, because fines on the admission of a widow to freebench never are arbitrary, and the description was

Literal
construction
impossible.

necessarily limited to such fines as are certain in some manors, and arbitrary in others: *White v. Cuddon*, 1842, 8 Cl. & F. at pp. 786 and 796. In that case, however, there was a misdescription, as the fines on descent were certain, those on alienation alone being arbitrary.

Alteration of
property.

If the property be correctly described in the particulars, but the vendor afterwards alters the property so as to make the description incorrect, the purchaser will be entitled to the same relief as if the vendor has misdescribed the property: see *Magennis v. Fallon*, 1829, 2 Mol. 561, where the vendor cut the ornamental timber, and the purchaser was held entitled to rescind.

The converse proposition seems also to be true, that if the description, though false at the date of the sale, is made true before the date fixed for completion there is no misdescription. Thus, on a sale of property let to weekly tenants, the rents at the date of issuing the particulars were less than the amount stated in the particulars, but subsequently, and before the completion of the contract, were, in consequence of recent repairs made by the vendors, raised to that amount in pursuance of a notice to that effect given to the tenants, who (apparently) acquiesced in the increase of rent; it was held that there was no misdescription: *Goddard v. Jeffreys*, 1881, 51 L. J. Ch. 57.

Reservations.

If the vendor intends to reserve any easements over the land, or rights inconsistent with the full enjoyment of the land, he must express his intention in clear and explicit language.

On the sale of a house the statement that the adjoining property of the vendor is "building land" would probably not be held to be a sufficiently explicit reservation so as to entitle the vendor to build in obstruction of the light to such house: see *Swansborough v. Coventry*, 1832, 9 Bing. 305. In that case the dispute arose after the conveyance, which expressly gave the purchaser the lights and easements belonging to the house sold. There had been a single-storeyed house on the "building land." The Court held that the purchaser of the parcel described in the particulars as "building land" might not build so as to obstruct the other purchaser's light. Cf. *Broomfield v. Williams*, 1897, 1 Ch. 602, where it was held that a reference in a conveyance and plan to adjoining land as "building land" did not

show a "contrary intention" within the Conveyancing Act, 1881, s. 6 (2).

If the particulars or conditions contain any undertaking on the part of the vendor, the purchaser will be entitled to specific performance of such undertaking if specific performance is possible. An undertaking to make a road and archway was specifically enforced in *Storer v. G. W. R.*, 1842, 2 Y. & C. Ch. 48. Undertaking.

If the vendor, through want of title, is unable to perform his undertaking, as where he is merely a lessee, and has no power to make a specified road, the purchaser will be entitled to relief : *Peacock v. Penson*, 1848, 11 Beav. 355.

An agreement by a railway company to purchase certain land "subject to the making such roads, ways, and slips for cattle, as may be necessary," was enforced against the company notwithstanding its vagueness, the expression being construed as meaning "such roads, ways, and slips for cattle as may be necessary and proper for convenient communication between the severed portions of the plaintiff's land" : *Sanderson v. Cockermonth Ry. Co.*, 11 Beav. 497. But a contract to sell an estate, the vendor reserving "the necessary land for making a railway through the estate to P.," was held too uncertain to be enforced : *Pearce v. Watts*, 1875, 20 Eq. 492.

A contract for a lease of a "newly built house," to contain covenants on the part of the lessee to repair, implies an undertaking on the part of the lessor to deliver the house in complete tenantable repair, proper to the character of the house : *Tildesley v. Clarkson*, 1862, 30 Beav. 419. Implied undertakings.

An agreement to let a furnished house implies a condition that the house shall be fit for occupation at the time at which the tenancy is to begin. If, then, the drainage is bad, and is not put right till after the time fixed for the commencement of the tenancy, the tenant will be entitled to rescind : *Wilson v. Finch Hatton*, 1877, 2 Ex. D. 336.

A statement by the vendor that he "guarantees" a certain amount of profit per annum will not be enforced as an undertaking ; but it may amount to a misrepresentation : *Gerhard v. Bates*, 1853, 2 Ell. & B. 476. See p. 18.

CHAPTER II

MISREPRESENTATION

MISDESCRIPTION may be conveniently divided into three kinds—

- (1.) Positive Misdescription or Misrepresentation ;
- (2.) Negative Misdescription or Non-disclosure ;
- (3.) Ambiguity.

The distinction between misrepresentation and non-disclosure is sometimes important. Where the purchaser is affected with notice of a fact (*e.g.* a patent defect), so that he would be precluded from complaining of the vendor's non-disclosure of the fact, a positive misrepresentation by the vendor has the effect of excluding the notice : *Dykes v. Blake*, 1838, 4 Bing N. C. 463 ; *Re Arnold*, 1880, 14 Ch. D. 270 ; *Redgrave v. Hurd*, 1881, 20 Ch. D. 1. Again, where the vendor's title is not bad but only "doubtful," if the vendor has made a misrepresentation the purchaser may, in addition to rescinding, recover his deposit, but in the absence of positive misrepresentation the purchaser would not be allowed to recover the deposit : see *Nottingham Brick Co. v. Butler*, 1886, 16 Q. B. D. at p. 787.

Dehors
the contract.

Misrepresentation has sometimes been distinguished from misdescription as being *dehors* the contract—*i.e.* made in the course of the treaty but not incorporated in the contract, whilst the description is part of the contract. This, however, is a wrong use of words. A positive statement of that which is untrue is just as much a "misrepresentation," whether the statement be *dehors* the contract or embodied therein. Thus, the written statement that the drains are in good order is, if false, as much a misrepresentation as if it was made verbally ; although it would seem from *De Lassalle v. Guildford*, (1901) 2 K. B. 215, that the verbal statement might, by being treated as a warranty, have a greater effect given to it than would be given to the same state-

ment if contained in the particulars. It is, of course, sometimes important to distinguish between a misrepresentation contained in the contract and a misrepresentation made by parol only (see below, p. 139, as to parol variation); but it is not expedient to mark this distinction by calling the one a misdescription and the other a misrepresentation.

Although, as a general rule, a vendor is not guilty of misrepresentation unless he makes some positive misstatement, there are exceptions to this rule. The vendor's statements, though literally true, may be calculated to mislead, or the conduct of the vendor or his agent may amount to misrepresentation, even though no actual misstatement of fact is made. In such cases the Court relieves the purchaser as if a misrepresentation had been made in actual words.

Misleading
statements.

It is not easy to distinguish between a misleading statement which is literally true and an "ambiguity." Perhaps this is the difference: in an ambiguity there are two possible meanings, either of which might be taken as the true meaning by a purchaser of ordinary sense who exercises ordinary care; in a misleading statement there are two possible meanings, one true and one false, and the true meaning (*i.e.* the meaning which makes the statement true) is one which would not be likely to occur to a person of ordinary sense.

In one case the particulars stated that part of the land to be sold was held by A. and B. "under an article of agreement for lease for four lives, bearing date 1804 and one year." In reality, the agreement was for a lease for four lives and one year from and after the expiration of a prior lease, which did not expire till 1843, and the tenants claimed to be entitled to a lease for four lives to be then named by them. The description was held to be so misleading as to exclude the effect of the notice of the lease of 1804, and to entitle the purchaser to rescind: *Martin v. Cotter*, 1846, 3 J. & L. 496.

In a conversation between the vendor, the vendor's solicitor, and the purchaser's solicitor, the vendor said there were restrictive covenants in one of the old title deeds, and thereupon the vendor's solicitor said he was not aware of any restrictions. This statement was considered equivalent to a representation

that the solicitor had seen the title deeds and found no restrictive covenants in them : *Nottingham Brick Co. v. Butler*, 1886, 16 Q. B. D. 778.

Similarly where at the auction the vendor's solicitor, or the auctioneer in his presence, said in answer to questions as to some alleged easements, "You may dismiss the subject from your mind; nobody will ever hear of the claims again," this was held to be misleading, having regard to the fact that the solicitor knew that the easements were claimed by the adjoining owner : *Heywood v. Mallalieu*, 1883, 25 Ch. D. 357.

Detailed
statements.

Great particularity in respect to some defects implies the non-existence of other defects of the same kind, and the description, though literally true, may be as misleading as an actual statement that the other defects do not exist.

Thus, on the sale of a leasehold house near Covent Garden Market, the particulars stated "no offensive trade is to be carried on, the premises cannot be let to a coffee-house keeper or working hatter," and this was considered as implying that other businesses of a non-offensive character could be carried on. As the lease prohibited several other businesses, including that of a fruiterer (a business the prohibition of which materially reduced the value of the house), the particulars were held to be misleading, and the purchaser entitled to rescind, although the lease was read aloud at the sale : *Flight v. Booth*, 1834, 1 Bing. N. C. 370. Jessel, M. R., in *Smith v. Chadwick*, 1884, 20 Ch. D. at p. 57, says, "Suppose a man states some of the covenants of a lease, but does not state a restrictive covenant on carrying on trade, says nothing about it, but says Go and look at the lease, can a purchaser complain?" It would seem from *Flight v. Booth* that he can, if the whole effect of the statement concerning the lease is misleading, even though no direct misstatement is made.

Where leasehold property, which was subject to a ground rent of 43*l.*, was put up for sale with a minute description of the rents received by sub-letting, and of a mortgage upon the property, but with no mention of the ground rent payable, this was considered as equivalent to a representation that there was no ground rent or only a very small ground rent, and the pur-

chaser was held not to be affected by notice of the lease to which the particulars referred, and a perusal of which would have corrected the erroneous impression made by the particulars : *Jones v. Rimmer*, 1880, 14 Ch. D. 588.

An agreement for an under-lease of a house to be granted by A. to B. stipulating that there should be the usual covenants, and that the house should not be converted into a school, was considered as amounting to a representation that A. had the power to grant a lease without any other restrictive covenants ; and as A. held under a lease containing other restrictive covenants, this was held to be a misrepresentation disentitling him from specific performance, although B. had notice of the head-lease : *Van v. Corpe*, 1834, 3 My. & K. 269.

But on an agreement for a twenty-one years' lease, to contain a covenant by the lessor " not to let any of the adjoining land for the purpose of making and burning bricks," the lease to be in the form of one to be inspected at the office of the lessor's solicitor, the lessee was held to be affected with notice of the fact (ascertainable from the form of lease referred to) that the covenant was to be confined to the lessor's life, and was not allowed to resist specific performance on the plea that the wording of the agreement was calculated to mislead him into thinking that he would get a covenant extending for the whole of the term : *Dawes v. Betts*, 1848, 12 Jur. 709.

Further, the silence of the vendor may, under certain circumstances, amount to an actual misrepresentation. If, for instance, the vendor, on being informed by the purchaser of his intention to use the property in a particular way, remain silent, his silence is equivalent to a representation that he does not know of anything which would prevent the purchaser from using the property in that way.

Vendor's
silence.

Thus if, on the treaty for an under-lease, the sub-lessee inform the sub-lessor that he intends to carry on a certain business on the premises, and the sub-lessor does not inform the sub-lessee that there are restrictive covenants in the superior lease which prohibit the sub-lessee's intended business, the silence of the sub-lessor is equivalent to a representation that there are no such covenants : *Flight v. Barton*, 1832, 3 My. & K. 282.

If the vendor of a lease which prohibits dangerous trades sells to an oil merchant, who informs the vendor that he intends to store large quantities of oil on the premises, and the vendor thereupon tells him of certain prohibitions in the lease, but omits to state that dangerous trades are prohibited, this omission is equivalent to a representation that dangerous trades are not prohibited; the vendor is presumed to know the terms of his lease, and in such a case the purchaser is not bound to look at the lease: *Power v. Barrett*, 1887, 19 L. R. Ir. 450.

On the sale of a *Claude*, the purchaser, who was influenced by the name of the owner as a guarantee of the genuineness of the picture, supposed the picture to be the property of Sir F. Agar, being led to that supposition by the fact that the agent was selling at the same time a number of Sir F. Agar's pictures. The agent knew of the purchaser's mistake, but did not un-deceive him. The purchaser was allowed to rescind the contract: *Hill v. Gray*, 1816, 1 Stark. 434. In *Keates v. Cadogan*, 1851, 10 C. B. 591, Jervis, C. J., says there was aggressive deceit in *Hill v. Gray*; but this does not seem to have been the case.

The above cases could not have been present to his mind when Joyce, J. (in *Seddon v. North-Eastern Salt, &c.*, (1905) 1 Ch. at p. 335), said, "As far as I know, silence has never yet been held to amount to misrepresentation."

Puffing Statements and Misrepresentation as to matters of Opinion

Puffing
statements.

A vendor is allowed to use laudatory epithets for the purpose of puffing the property which he is selling, and to make statements as to the value of the property, or as to probable profits, chances, risks, or other matters of opinion, provided that the statement does not involve a misrepresentation of a specific fact. The use of such epithets and statements of opinion, even if the Court considers them to be not justified by the facts, will not entitle the purchaser to relief. The rule of Roman law is the same: *simplex commendatio non obligat*. The theory is that praise conferred by the vendor and the vendor's estimate of the value of his own property do not influence, or at all events ought not to influence, the purchaser's judgment, and that, even if they are

unfounded, the purchaser has suffered no wrong because he relied on his own opinion, or accepted the vendor's opinion at his own risk.

It is not always easy to say whether a given statement is a puffing statement or expression of opinion, or whether it amounts to a statement of fact. "It is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well-known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion": per Bowen, L. J., in *Smith v. Land Corporation*, 1884, 28 Ch. D. 7, 15.

If the vendor make a false statement as to the opinion of an expert, this, of course, is a misstatement of fact. But if he correctly state the expert's opinion and that opinion is wrong, there is no misstatement, and the purchaser who trusted the expert cannot say that he was deceived by the vendor. The purchaser would, moreover, in the absence of fraud have no right of action against the expert employed by the vendor: *Le Lièvre v. Gould*, (1893) 1 Q. B. 491, overruling *Cann v. Willson*, 1888, 39 Ch. D. 39.

"Uncommonly rich water meadow land" was held to be no misrepresentation, although the land was in reality imperfectly watered: *Scott v. Hanson*, 1826, 1 Russ. & Myl. 128. Examples.

"Part arable and part marsh land in a high state of cultivation" is a misrepresentation if the marsh land is in an impoverished condition: *Dyer v. Hargrave*, 1805, 10 Ves. 505.

"Fertile and improvable" is mere puff, although the land in question has been abandoned as useless. But if a considerable part of the land is covered with water, or otherwise irreclaimable, the statement amounts to a misdescription: *Dimmock v. Hallett*, 1866, 2 Ch. 21, 27.

“The land in course of time may be covered with warp from the river Trent, and considerably improved at a moderate cost,” was held not a misrepresentation, although there were no means of warping within three miles, and the expense would be 25*l.* an acre : *Ibid.*

“Has lately undergone a thorough repair” is a statement of fact, and the house being ruinous and condemned by the district surveyor, the purchaser was allowed to rescind : *Loyes v. Rutherford*, Sug. 331.

“Substantial and convenient” and “having five bedrooms” was not considered to be a misdescription, although one of the external walls was only half a brick thick, and the walls had slight cracks in them, and two of the bedrooms, though just large enough to contain a bed, were mere inner rooms or closets without fireplaces : *Johnson v. Smart*, 2 Giff. 151, affirmed on appeal 21 July, 1860.

But “substantial and well-built” was considered a misstatement of fact where the buildings were seriously defective : *Cox v. Middleton*, 1854, 2 Drew. 209.

“Brick-built” is a misdescription if the house is partly brick, and partly timber and lath and plaster : *Powell v. Double*, Sug. 29.

“Not damp” is a statement of fact, not opinion : *Strangways v. Bishop*, 1857, 29 L. T. o.s. 120.

“Residence fit for a respectable family” is mere puff. But the words “with a demesne tastefully laid out,” being explained by a map showing trees and shrubs, amount to misrepresentation if the trees and shrubs do not exist : *Magennis v. Fallon*, 1829, 2 Mol. 589.

The words “eligible for the erection of genteel residences of a superior description” were not treated in *Peacock v. Penson*, 1848, 11 Beav. 355, as mere puff. In that case the vendor, who had by the conditions undertaken to lay out roads shown on a map, was held not to be entitled to cut up the land differently in a manner likely to attract a lower class of residents.

On the sale of a life interest the vendor stated that the tenant for life was a “very healthy gentleman, aged forty-eight.” This statement was afterwards modified to “a healthy gentleman, aged forty-eight, whose life is insurable.” The fact was,

that the insurance companies, though willing to insure the life, would do so only on payment of a much higher rate than the highest rate of insurance of a healthy life of the same age. This was held to be misdescription and not mere puff : *Brealey v. Collins*, 1831, You. 317.

On the sale of an annuity the vendor stated that the grantor was a man "in good circumstances, and of large property." The fact was that he was then, and had for some time been, in prison for debt. The statement was, in an action of deceit brought by the purchaser, held to be a mere puffing statement : *Dawes v. King*, 1815, 1 Stark. 75 (*sed qu. ?*).

The description, "let to F. a most desirable tenant," has been held to be not a mere expression of opinion, but to contain an implied assertion that the vendor knows of no facts leading to the conclusion that F. is not a satisfactory tenant, and, F. being at the time to the knowledge of the vendor unable to pay his rent, the purchaser was relieved : *Smith v. Land Corporation*, 1884, 28 Ch. D. 7.

On the sale of 500*l.* Consols standing in the names of directors, and held by them as an indemnity against costs in a pending Chancery suit, and subject thereto upon trust for the vendor, the vendor stated these facts, and added, "There is a considerable sum applicable for payment of costs, and such costs will be paid thereout, being in fact part of a residuary estate, shares in which have been the subject of sales to insurance companies. The estate of the testator was upwards of 100,000*l.*, the residuary estate exceeded 20,000*l.*; the fund of 500*l.* and dividends may therefore be looked upon as a sound and secure investment." The vendor had been informed by the directors' solicitor that they had paid 1,250*l.* costs which they hoped to get back from the estate, but that the whole of the 500*l.* might possibly be absorbed by the costs. It was held that under the circumstances the vendor's statements were misleading : *Matthias v. Yetts*, 1882, 46 L. T. 497.

On an agreement for a lease of a limestone quarry the lessor represented that the lime was "fit for the London market," the lessee having previously said that, unless the lime were fit for the London market he could not take the lease. It was

proved that the words meant in the trade line of the best quality. The statement was held to be a misdescription of a specific fact : *Higgins v. Samels*, 1862, 2 J. & H. 460.

Matters of
probability.

On the sale of an advowson, the vendor stated "a voidance of this preferment is likely to occur soon," the fact being that the then incumbent was only thirty-two. This was considered not to be a definite misdescription, and the purchaser was not relieved : *Trower v. Newcome*, 1813, 3 Mer. 704.

"The directors feel justified in stating that they confidently believe the profits of this company will be more than sufficient to pay 50 per cent." was held to be a mere expression of opinion : *Be lairs v. Tucker*, 1884, 13 Q. B. D. 562.

The statement in the prospectus of a company "we do not hesitate to guarantee a minimum annual dividend of 33 per cent." was, however, held to be a fraudulent misrepresentation rendering the directors liable for damages : *Gerhard v. Bates*, 1853, 2 Ell. & B. 476.

Value.

An estate was described as of "nearly equal value with freehold, being held by a college lease for thirty-three years at a ground rent of 3*l.* 7*s.*, and renewable every ten years upon payment of a small fine," the facts being that the renewal and the fine were both arbitrary, the amount of the fine last paid being 700*l.* It was held that the representations as to the fine being "small" and the tenure being "nearly equal to freehold" were indefinite and calculated to put the purchaser upon inquiry. Under certain circumstances such representations might be a ground for rescission, as if the vendor knew that the purchaser entertained a false idea of the fine. But in this case the purchaser tried to find out the amount, and offered 150*l.* if the vendor would pay the surplus; the refusal of this offer ought to have put him on inquiry : *Fenton v. Browne*, 1807, 14 Ves. 144.

The statement that a ground rent is "amply secured" would seem to be only a puffing statement; at any rate, if due notice of the real state of the facts is given, the purchaser will not be entitled to relief because of such words even if untrue. See *Smith v. Watts*, 1858, 4 Drew. 338.

The assertion by the vendor that the land is worth so much is a mere expression of opinion : *Harvey v. Young*, 1602, Yelv. 20.

But the statement that the estate “clears a net value of £—— per annum” is a statement of fact : see p. 2.

The statement that a colliery actually realised £—— annual profits is, if untrue, a misrepresentation ; but the statement that a colliery producing such profits is worth £—— is a mere expression of opinion : *Powell v. Elliot*, 1875, 10 Ch. 424.

The statement that F. and C., two timber merchants, had valued the timber at 3,500*l.*, the fact being that they had valued it at 2,500*l.* only, is a misrepresentation : *Buxton v. Lister*, 1746, 3 Atk. at p. 386.

A false statement by the vendor that he had never offered the property for less than he was then asking will enable the purchaser to resist specific performance : *Roots v. Snelling*, 1883, 48 L. T. 216. So probably a false statement by the vendor that he had had such and such offers for the property would entitle the purchaser to resist specific performance, though not, it has been said (1 Ro. Abr. 101, pl. 16), to recover damages in an action of deceit.

Misrepresentation of Law

The vendor's innocent misrepresentation of a matter of law will not entitle the purchaser to relief : *Rashdall v. Ford*, 1866, 2 Eq. 750. Matters of law.

The purchaser is assumed to know the law, and the misrepresentation of the vendor on that assumption has no effect on the purchaser's mind : *Lewis v. Jones*, 1825, 4 B. & C. at p. 512. As to a fraudulent misrepresentation of law see below, p. 63.

It is not always easy to say of a given statement whether it is a statement of fact or a statement of law. If a fact is stated which involves a conclusion of law, the statement may be made so as to be a statement of the fact only, or it may be made as a statement of law followed by a statement of the fact by way of deduction from the law so stated : per Jessel, M. R., in *Eaglesfield v. Londonderry*, 1876, 4 Ch. D. 702.

Where a tramway company's Act enabled them to employ animal power, and, with the consent of the Board of Trade, steam or other mechanical power, a statement by the directors,

who had not obtained the consent of the Board of Trade, that by their special Act the company had a right to use steam power instead of horses, was held to be a misrepresentation of fact : *Peck v. Derry*, 1887, 37 Ch. D. at pp. 571, 581.

On the sale of an agreement for a lease to contain the "usual covenants," the vendor sent the purchaser a copy of the agreement for the lease, and, in answer to the purchaser's inquiries, said that the lessee would not have to do substantial repairs. As a covenant to do substantial repairs is a usual covenant, this was a misrepresentation. But it was held that it was a misrepresentation of law, not of fact, and specific performance was decreed : *Kendall v. Hill*, 1860, 6 Jur. N. S. 968.

On the other hand, the representation that there was nothing in a certain deed which would prevent the carrying on of a boys' school was held to be a representation of fact : *Wauton v. Coppard*, (1899) 1 Ch. 92.

Misrepresentation of Intention

Intention.

The expression by the vendor of his intention is sometimes treated as an undertaking or contract. In such cases, if the statement of intention is embodied in the agreement for sale, the purchaser can enforce it, or if the vendor is unable to carry out the intention the purchaser is entitled to rescission or compensation ; but if it be not embodied in the agreement, the vendor cannot get specific performance without carrying it out. See, further, "parol variation," p. 143.

If the representation of intention is not regarded by the Court as amounting to an undertaking or contract, the purchaser can obtain relief if the vendor has misrepresented his intention, but not if the vendor truly stated his intention and afterwards altered it.

Intention
= under-
taking.

A representation made by the lessor in an agreement for a lease that the covenants contained in the draft restraining the use of the house for trade or business were usually contained in leases granted by the lessor of his other houses in that estate, was, in the Court of Appeal, held to amount to a collateral contract with the lessee that the other houses should continue to be used as private dwelling-houses, and such contract was held

to be enforceable by the lessee, even though no undertaking or covenant on the part of the lessor was inserted in the lease : *Martin v. Spicer*, 1886, 34 Ch. D. 1. In the House of Lords (*Spicer v. Martin*, 1888, 14 App. Ca. 12) Lord Fitzgerald inclined to the same view, but Lord Macnaghten, in whose judgment Lord Watson concurred, considered that the representation in question was not intended or understood to convey any assurance as to the continuance of the existing state of things, and would not of itself entitle the lessee to invoke the aid of the Court. The decision of the Court of Appeal was, however, affirmed on the ground that there was a general building scheme.

In *Mackenzie v. Childers*, 1889, 43 Ch. D. 265, Kay, J., held that a recital in a deed that it was "intended" that other purchasers should execute it and be bound by the covenants was a contract and not a mere statement of intention. In *Myers v. Watson*, 1851, 1 Sim. N. S. 523, a statement of the vendor's intention (p. 525 *ibid.*) to lay out an estate and to build a church was treated as an undertaking.

It is clear that a representation of intention, if true at the time it is made, is not falsified by an alteration of that intention. Further, unless the representation virtually amounts to a promise or undertaking, the vendor is entitled to alter his intention, notwithstanding the representation : *Jordan v. Money*, 1854, 5 H. L. Ca. 185. "The doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts" : per Lord Selborne in *Maddison v. Alderson*, 1883, 8 App. Ca. 467, at p. 473. "A representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a representation, if it is anything it is a contract or promise" : per Mellish, L. J., in *Beattie v. Ebury*, 1874, 7 Ch. 777.

Alteration of intention.

If, however, a person states as his intention that which never was his intention, this is a misrepresentation of a fact, and from the nature of the case it is a fraudulent misrepresentation.

Misrepresentation of intention.

Where the directors of a company issued a prospectus inviting subscription for additional capital, to be employed in improving

the buildings of the company and purchasing horses and vans, their real object being to obtain money to meet their pressing pecuniary liabilities, it was held that this misrepresentation of intention was a misrepresentation of fact also, and the directors were liable to an action of deceit: *Edgington v. Fitzmaurice*, 1885, 29 Ch. D. 459, 483.

It might perhaps be argued (see *Alderson v. Maddison*, 1880, 5 Ex. D. at p. 303) that as the intention, even if it existed, might be altered at any moment, the misstatement of the intention is an immaterial misrepresentation, one not *dans locum contractui*—in other words, one upon which the party to whom the statement is made does not rely, or on which, if he relies at all, he relies at his own peril. See below, p. 72.

But even if this reasoning is correct, the statement of intention in *Edgington v. Fitzmaurice*, 1885, 29 Ch. D. 459, might be regarded as an implied misrepresentation of a fact. The statement that the directors intended to spend the money in improving the buildings implied that the directors knew of nothing to prevent them from so applying the money or to make such an application of the money improbable. As they were hard pressed by the creditors of the company, this statement was untrue: cf. Bowen, L. J.'s judgment in *Smith v. Land Corporation*, 1884, 28 Ch. D. 7, stated above, p. 17.

In one case the vendor, previously to the sale, handed the auctioneer a paper in his own writing, which stated that it was in contemplation to widen a lane leading to the property by purchasing the houses at the entrance and to form a new street, as represented by the dotted line on the plan annexed to the particulars, and that, if the same could not be otherwise done, the vendor would apply to Parliament for an Act to enable him so to do. This paper, by the vendor's directions, was read to the persons assembled at the sale. The vendor was not the owner of the land over which the new street was to be made. The Court held that the vendor was not entitled to specific performance without carrying his undertaking into effect: *Beaumont v. Dukes*, 1822, Jac. 422. It would appear from p. 425 of the report that the Court thought the statement of intention was false, as the vendor did not design to carry it into effect. But the

purchaser would have been entitled to relief also on the ground of the misdescription contained in the plan, and on the ground that the statement was, in fact, an undertaking, and that a parol contract had been entered into which the defendant could insist on having read into the agreement.

Where, pending negotiations for a building under-lease, the sub-lessor, who was lessee of adjacent land, made a representation that he could not obstruct the sea view, being bound by covenants himself, and afterwards surrendered his lease and obtained a new one without the covenants, the sub-lessee, who had taken the under-lease and erected buildings on the faith of the representation, was held entitled to an injunction restraining the sub-lessor from so building as to obstruct the sea view : *Piggott v. Stratton*, 1859, John. 341 ; affirmed (partly on the ground of the representation and partly on the construction of the under-lease itself), 1 De G. F. & J. 33.

The principle involved in this decision is thus stated by Lindley, L. J., in *Martin v. Spicer*, 1886, 34 Ch. D. 12 : " If a man makes a representation that property is subject to covenants affecting it permanently, and he does so in order to induce a person to buy part of such property, and the person buys on the faith of such representation, the representation amounts to a contract by the vendor that he will not do anything to prevent the property from continuing what he has represented it to be." The *ratio decidendi*, however, of *Piggott v. Stratton*, so far as the question of representation is concerned, seems to have been that the representation operated by way of estoppel rather than as a contract : John. at p. 359.

The representation in *Piggott v. Stratton* was one of fact ; what the vendor said amounted virtually to a representation that the existing state of things must continue, and that the sub-lessor *could* not get rid of his liability, rather than a representation that he did not intend to get rid of his liability by surrendering the lease or otherwise. See, on *Piggott v. Stratton*, the remarks of Kay, L. J., in *Low v. Bouverie*, (1891) 3 Ch. 110.

Misrepresentation Concerning a Patent Defect

In the absence of misrepresentation the existence of a patent defect does not entitle the purchaser to relief: see p. 31. But if the vendor makes any misrepresentation on the point or diverts the purchaser's attention from the defect, still more if he hides or industriously conceals it, the purchaser is entitled to relief.

“ If a man makes a description calculated to mislead, I do not think it is well for him to say, ‘ If you had been very careful, you would have found out the blunder.’ How was it that he did not himself find it out ? ” per James, L. J., in *Re Arnold*, 1880, 14 Ch. D. 270, 281.

If the vendor intentionally diverts the purchaser's attention from or industriously conceals a patent defect, the purchaser will be relieved: *Shirley v. Stratton*, 1785, 1 Bro. Ch. C. 440. Thus where the vendor to hide a defect in a main wall plastered it up and papered it over, the purchaser recovered (*qu.* his deposit): anonymous case mentioned in *Pickering v. Dowson*, 1813, 4 Taunt. 785. Similarly on a sale of chattels: *Baglehole v. Walters*, 1811, 3 Camp. p. 156; *Schneider v. Heath*, 1813, 3 Camp. 506. See further, as to concealment of a patent defect, *Cook v. Waugh*, 1860, 2 Giff. 201 (agreement to grant a lease).

A representation by the vendor that the house is substantial and well-built relieves the purchaser from the necessity of inspecting the house for himself, and though the defect is patent the purchaser will be entitled to relief: *Cox v. Middleton*, 1854, 2 Drew. 209.

Where property measuring thirty-three feet in depth was described as being forty-six feet in depth, the purchaser was relieved, although, being in occupation of the premises, he could have easily discovered the real measurement: *King v. Wilson*, 1843, 6 Beav. 124.

Where the purchaser, seeing stains on the walls and other signs of damp, was satisfied with the vendor's explanation that it was caused by the overflow from a gutter at the top of the house, and that the house was not damp, the purchaser was held entitled to relief on it being proved that the house was

permanently damp : *Strangways v. Bishop*, 1857, 29 L. T. o.s. 120.

A house was subject to dry-rot. The vendor misrepresented the state of repairs, and the purchaser relied on the vendor's representation, telling the vendor that he had not had the premises surveyed, because he relied on him. The purchaser was relieved : *Grant v. Munt*, 1815, G. Coop. 173. The dry-rot in that case was not perfectly visible, and so probably would have been regarded as a latent defect, and the purchaser would have been relieved even in the absence of a positive misrepresentation.

A fault in a mine was concealed, being blocked up with rubbish. The purchaser (or his agent), before inspecting the mine, had asked, "Is there any fault in the mine?" to which the vendor had answered, "God knows; if you go down you will see all that I know." On seeing the rubbish which concealed the fault the purchaser asked, "What is the meaning of this rubbish; why do you not get the coal found in that direction?" and was answered, "We do not wish to work in that direction; we have got quite coal enough." It appears that the purchaser would have been entitled to relief had he not subsequently waived his right by his conduct : *Small v. Attwood*, 1832, You. 407, at p. 490; 1838, 6 Cl. & F. 232, see p. 357.

Where a representation is made by the vendor as to repairs, or the state of cultivation, the purchaser is not bound to make such a minute inspection of the property as if there had been no representation : *Dyer v. Hargrave*, 1805, 10 Ves. 505, at p. 509. *Qu.* does it not absolve the purchaser from the necessity of making *any* inspection of the property as to repairs or state of cultivation? See above, p. 24; *Cox v. Middleton*, 1854, 2 Drew. 209.

If the vendor describes the property as "building land," this implies a representation that the property is fit for the purpose of building on, and if there is an adverse right of way across the property, or anything else which makes the land useless or less valuable for building purposes, the purchaser will be entitled to rescind (or obtain compensation) if he have relied on the representation, notwithstanding that the defect is patent : *Dykes v. Blake*, 1838, 4 Bing. N. C. 463. In *Shackleton v. Sutcliffe*, 1847,

"Building land."

1 De G. & Sm. 609, the defect was a right of water-way which, even if the property had not been described as "building land," would have been sufficient to entitle the purchaser to relief, as being a latent defect.

Misrepresentation versus Notice

Misrepresentation
versus
notice.

Where the vendor has been guilty of misrepresentation, the effect of notice is excluded, as the purchaser is justified in relying on the vendor's own statement: *Camberwell, &c. v. Holloway*, 1879, 13 Ch. D. at p. 762.

The description "leasehold business premises" implies a representation that the purchaser will be able to carry on any business, subject only to the restrictions imposed by the general law or the statutory restrictions affecting any particular trade. Such a description, therefore, will prevent a vendor from enforcing specific performance if the lease contains covenants restricting user as a public house, or the carrying on of any trade to the "annoyance, nuisance, or damage" of others, notwithstanding there is a condition binding the purchaser not to make any objection in respect of "any clause, matter, or thing contained in or omitted from the original lease of the premises or other document of title": *Davis and Carey*, 1888, 40 Ch. D. 601.

Where the right to receive a yearly sum by way of rent for the user of a piece of land as a pleasure ground was put up for sale as a "freehold ground rent," and reference was made in the particulars to the lease reserving the rent, it was held that the purchaser was not bound to look at the lease in order to discover that the thing sold was not a ground rent: *Robins v. Evans*, 1863, 2 H. & C. 410.

But where a leasehold ground rent, described as "amply secured on certain houses," was in reality secured by an underlease for a term longer than that created by the lease, but the particulars went on to show how the ground rent was secured, and the conditions mentioned the fact of the length of the term, and offered the purchaser inspection of the lease and underlease, the Court held that the purchaser could not complain: *Smith v. Watts*, 1858, 4 Drew. 338.

In *Re Arnold*, 1880, 14 Ch. D. 270, the particulars described the property as "a compact small farm, containing 41a. 3r. 35p., divided as follows"; and in the enumeration of the closes, one close was described as "490A, Bottlesey Green, containing 7a. 1r. 27p.," but the measurement given in the column showing the "contents" gave the size of that close as 4a. Or. 38p., and this smaller amount tallied with the total amount of 41a. 3r. 35p. A plan was annexed to the particulars including the whole of 490A. The vendor was entitled only to four undivided sevenths of 490A. He contended that the purchaser could see from the conflicting measurements in the particulars that a mistake had been made, and that the plan must have shown the purchaser that 490A contained more than 4a. Or. 38p., because an adjacent close of 1a. Or. 28p. afforded an easy comparison. The purchaser was held entitled to rescind.

On the sale of a lease it often happens that the vendor refers to the lease as containing "the usual covenants." If the covenants are unusual, the misrepresentation entitles the purchaser to relief, notwithstanding that he has notice of the lease, and could have seen that the covenants were unusual. "Usual covenants."

The question "What is a usual covenant?" is a matter of evidence. Usual covenants may change from one generation to another; they may vary in different parts of the country. In *Hampshire v. Wickens*, 1878, 7 Ch. D. 555, Jessel, M. R., refers to Davidson's Precedents as showing what were usual covenants at that time.

A distinction must be drawn between a contract to sell a lease containing "the usual covenants," and a contract to grant a lease. A wider construction is put upon the word "usual" in the first case than in the second: compare the decision in *Strangways v. Bishop*, 1857, 29 L. T. o.s. 120, with that in *Hampshire v. Wickens*, 1878, 7 Ch. D. 555 (below, p. 28).

The following illustrations are taken from cases in which the dispute was between a vendor and a purchaser, or between a sub-lessor and sub-lessee, as to the covenants in the head-lease. "Usual" as between vendor and purchaser.

A covenant by the lessee to pay land tax, sewers rate, and all taxes is a usual covenant: *Bennett v. Womack*, 1828, 7 B. & C. 627.

A covenant to do substantial repairs is a usual covenant : *Kendall v. Hill*, 1860, 6 Jur. N. S. 968.

A covenant to build houses of a specified yearly tenantable value specifying no time limit within which the building is to be required is unusual : *Andrew v. Aitkin*, 1882, 22 Ch. D. 218.

A covenant not to mow meadow land more than once a year is, in the case of a farm lease, not an unusual covenant, although it is more usual to qualify the covenant by excepting from its operation cases where an equivalent in the shape of manure is brought on the land : *Hyde v. Warden*, 1877, 3 Ex. D. at p. 82.

A power of re-entry if the lessee should become bankrupt or make a composition with his creditors, or if execution should issue against him, is unusual, especially if the word "lessee" is expressed to include assigns : *Ibid.*

A power of re-entry if any business but that of a licensed victualler should be carried on in the house is usual in a lease of a public house : *Bennett v. Womack*, 1828, 7 B. & C. 627.

A covenant not to assign without leave is usual at all events in or near London : *Strangways v. Bishop*, 1857, 29 L. T. o.s. 120.

A stipulation that under-leases and assignments shall be left with the lessor's solicitor for registration, and a fee of one guinea paid, is unusual : *Brookes v. Drysdale*, 1877, 3 C. P. D. 52.

"Usual" as
between
lessor and
lessee.

The following cases, illustrating what are usual covenants and what unusual, are added, with this caution, that, being cases of agreements to grant leases, the construction of the word "usual" is stricter than the construction adopted in the case of an agreement to sell an existing lease.

A covenant in restraint of trade is unusual : *Van v. Corpe*, 1834, 3 My. & K. 269.

A covenant not to assign without licence is unusual : *Henderson v. Hay*, 1792, 3 Bro. C. C. 632 (public house); *Buckland v. Papillon*, 1866, 1 Eq. 477; *Hampshire v. Wickens*, 1878, 7 Ch. D. 555; *Bishop v. Taylor*, 1891, 60 L. J. Q. B. 556; and *Lander and Bayley*, (1892) 3 Ch. 41 (public house).

A covenant to reside on the premises is unusual even in the case of a public house : *Lander and Bayley*, *ubi sup.*

A power of re-entry on the bankruptcy of the lessee is not a usual clause in a mining lease : *Hodgkinson v. Crowe*, 1875, 19 Eq. 591. A power of re-entry on the lessee's bankruptcy was considered usual in *Haines v. Burnett*, 1859, 27 Beav. 500, which was a case of a hotel lease. But this case was disapproved by Jessel, M. R., in *Hampshire v. Wickens*, 1878, 7 Ch. D. 555.

A power of re-entry in case of "breach of any of the covenants and agreements by the lessee herein contained" is not a usual clause in a mining lease : (*Hodgkinson v. Crowe*, 1875, 10 Ch. 622), nor in any lease : *Anderton and Milner*, 1890, 45 Ch. D. 476 ; *Lander and Bagley*, (1892) 3 Ch. 41.

A power of re-entry limited to non-payment of rent is a usual clause : *Anderton and Milner*, 1890, 45 Ch. D. 476.

Misrepresentation by Agent

An innocent misrepresentation made by the auctioneer, or other person employed by the vendor as his agent to sell the property, will, if made in the ordinary course of business as auctioneer or agent for sale, have the same effect on the rights of the vendor and purchaser as an innocent misrepresentation made by the vendor himself : *Mullens v. Miller*, 1882, 22 Ch. D. 199.

If the vendor mentions a defect in the property, and the vendor's solicitor says, "I have looked through the title deeds and you are wrong," the purchaser, if he relies on the solicitor's statement rather than on that of the vendor, is entitled to relief : see *Nottingham, &c. v. Butler*, 1886, 16 Q. B. D. 778.

The fact that the agent has no authority to make the statement complained of is immaterial : *Brett v. Clowser*, 1880, 5 C. P. D. at p. 386. In *Manser v. Back*, 1848, 6 Ha. 443, however, the signing by the auctioneer of a contract containing no agreement to reserve to the vendor a right of way which the vendor had instructed him to reserve was held not to be binding on the vendor.

CHAPTER III

NON-DISCLOSURE

It is often said that the vendor is not under an obligation to disclose defects in the property which he is selling, even if he knows that the purchaser is ignorant of the true state of the facts. The maxims used are *caveat emptor* and *aliud est celare, aliud tacere*. The "mere silence" of the vendor, or his "passive acquiescence in the purchaser's self-deception" (Cockburn, C. J., in *Smith v. Hughes*, 1871, L. R. 6 Q. B. 597), is opposed to an "industrious concealment" (*Shirley v. Stratton*, 1785, 1 Bro. Ch. C. 440) or "aggressive deceit" (*Keates v. Cadogan*, 1851, 10 C. B. 591) on the vendor's part; and while the latter is considered as entitling the purchaser to relief, the former is regarded as perfectly justifiable.

The law is, however, laid down in too general a way if a sale of real property, and not of chattels, is under consideration. In the first place, the maxim *caveat emptor* does not apply to *latent* defects. And if the vendor wishes to preclude the purchaser from objecting to a defect in his title he must mention the defect in the particulars or conditions of sale. The vendor of real estate is bound to point out a "material defect in the title or in the subject of sale, which defect is exclusively within his knowledge or which the purchaser could not be expected to discover for himself with the care ordinarily used in such transactions": per Joyce, J., in *Carlish v. Salt*, (1906) 1 Ch. p. 341.

It is difficult to say how far the vendor's knowledge is a material element in a case of non-disclosure. In regard to defects which the vendor is under no duty to disclose (*e.g.* patent defects) the vendor's knowledge is immaterial. In

matters of title the vendor's knowledge seldom is material except in regard to the question of the fairness of the conditions of sale. The vendor ought to know his own title, and if the purchaser discovers a defect in the title which the vendor ought to have informed him of, the vendor cannot plead his own ignorance as an excuse for the non-disclosure. In regard to other defects which it is the vendor's duty to disclose, it would seem that the vendor's knowledge of the defect is necessary in order to entitle the purchaser to relief for the non-disclosure (*Lucas v. James*, 1849, 7 Ha. p. 418); or, at any rate, that if the vendor was ignorant of the defect the purchaser could at most only resist specific performance, as in *Hope v. Walter*, (1900) 1 Ch. 257; but that if the vendor knew of the defect and did not disclose it the purchaser would be entitled to recover his deposit and costs of investigating title. This, however, is not quite clear. Not only is it difficult to say what difference the vendor's knowledge or ignorance makes in regard to his liability to disclose material facts, but it is difficult in many cases to say whether the matter in question is or is not one which the vendor ought to have disclosed.

The vendor's duty with regard to disclosure may be discussed by considering first the non-disclosure of defects in the physical condition of the property or of other matters of fact, and secondly the non-disclosure of defects in title.

Non-disclosure of Matters of Fact

A patent defect in the physical condition of the property need not be mentioned, but a latent defect ought to be mentioned, at any rate if the vendor knows of it.

Defects in physical condition of property.

A patent defect is a defect in the physical condition of the property which a purchaser would be likely to discover if he inspected the property with ordinary care. A latent defect is one which a purchaser, inspecting the property with ordinary care, would not be likely to discover. In *Lucas v. James*, 1849, 7 Ha. 410, at p. 418, a latent defect is defined as "one which a provident purchaser could not discover."

It has been said that a right of way unknown to both vendor and purchaser is a latent defect: Chitty, J., in *Ashburner v.*

Sewell, (1891) 3 Ch. p. 409. But a defect may be latent even if the vendor is aware of it; and conversely, it may be patent even if it is unknown to both vendor and purchaser.

Some matters, such as rights of way, underground culverts, projecting rooms, are of a twofold nature. So far as they are defects they are defects of title; but so far as they are patent or latent, their patency or latency is in many cases physical. They are, on the whole, more conveniently treated under the heading of defects in the physical condition of the property.

A house was sold, over part of which a room belonging to another house projected to the extent of 3 feet by 17. The plan, being merely a ground plan, did not notice this projection. The purchaser had no knowledge of the internal state of the building, and there was no evidence that the defect could have been detected externally by the eye. It was held that this was a latent defect, and the purchaser was discharged: *Pope v. Garland*, 1841, 4 Y. & C. at p. 404 (sale by the Court).

The fact that the property sold is (though unknown to the vendor) being used for an immoral purpose will be treated by the Court as a reason for not decreeing specific performance at the instance of the vendor, but will not entitle the purchaser to recover his deposit: *Hope v. Walter*, (1900) 1 Ch. 257. In *Cornfoot v. Fowke*, 1840, 6 M. & W. 358, the non-disclosure of the existence of a brothel next door was held not to justify the defendant, who had agreed to take a furnished house, in refusing to complete (but *qu.?*) In *Lucas v. James*, 1849, 7 Ha. 410, a case of a house let for a family residence, it was said (p. 418) that the non-disclosure of the existence of brothels in the neighbourhood would perhaps prevent the Court from granting specific performance, but that if the vendor were ignorant of the fact he could get specific performance.

On the sale of a lease containing a covenant to deliver up the premises in good repair at the end of the term, if any of the buildings have been removed this should be mentioned: *Granger v. Worms*, 1814, 4 Campb. 83. The non-existence of the buildings is not a patent defect, because the purchaser does not necessarily know that there ever were such buildings. And though in that case the lease which contained a description of the buildings

(including the summer-house, which was afterwards pulled down) was produced and read aloud at the sale, the purchaser might either not have heard it, or not have paid attention to the point.

With regard to rights of way across the property sold, where no track or only an indistinct track is visible, the easement would probably be held to be a latent defect. In regard to well-marked footpaths the easement would probably be held to be a patent defect. With regard to roads the defect is, physically considered, patent; but if the road might be mistaken for an occupation road without any right of way in the public or in third persons, then, it is suggested, the defect is latent. "Where it is obvious that there is a right of way enjoyed by some third person, or by the public in general, the existence of such right of way cannot give rise to any objection to the title, as, for example, if the estate sold is a large one with a public highway running through it, then it is obvious that it is not intended to sell the property free from such right of way; but the purchaser would take subject to the right of way": per Chitty, J., in *Ashburner v. Sewell*, (1891) 3 Ch. p. 408.

The existence of a way round, and a footpath across, a field which was sold as a "meadow," was held to be a patent defect, and one which did not entitle the purchaser to resist specific performance: *Bowles v. Round*, 1800, 5 Ves. 508. But this case has been doubted: see *Ellard v. Llandaff*, 1810, 1 B. & B. at p. 249. And Jessel, M. R., in *Cato v. Thompson*, 1882, 9 Q. B. D. at p. 619, referring to *Bowles v. Round*, though not mentioning it by name, treats it as a case where the purchaser knew of the defect: this, however, is incorrect.

On the sale of arable land, the absence of a right of way for carts and carriages is a defect entitling the purchaser to relief: *Denne v. Light*, 1857, 8 De G. M. & G. 774; *Curling v. Austin*, 1862, 2 Dr. & Sm. 129.

The existence of a waterway through the property is not generally a patent defect, and in one case a purchaser was not presumed to know that there was an easement of waterway over the property, or to be affected with notice thereof, from the fact that he was well acquainted with the property, and

constantly passed some wells which were supplied by an underground watercourse running through the property : *Shackleton v. Sutcliffe*, 1847, 1 De G. & Sm. 609.

But the purchaser was held not to be affected with notice of an underground culvert, which took water from a ditch on one side of the property to a ditch on the other side, both ditches being dry at the time the purchaser inspected the property and the vendors themselves being ignorant of the culvert : *Puckett and Smith*, (1902) 2 Ch. 258 (where the property was sold for building).

On the sale of a house with windows overlooking the land of a third person, the vendor is not bound to disclose the fact that the windows are not entitled to the access of light over that land or to state that the light is enjoyed *precario* and on payment ; in other words, the purchaser is not justified in assuming that there is an easement or that the statutory period has begun to run : *Greenhalgh v. Brindley*, (1901) 2 Ch. 324 (specific performance decreed, but no order as to costs).

On an agreement for a lease of a coal mine, the lessor did not inform the lessee that he had worked the mine twenty years ago, and abandoned it as unprofitable. The lessee examined the mine himself before the contract, and saw the abandoned workings. The Court granted specific performance : *Haywood v. Cope*, 1858, 25 Beav. 140. In such a case, if the whole of the coal had been gotten the purchaser or lessee might be entitled to relief : *Ridgway v. Sneyd*, 1854, Kay, p. 635. If the vendor or lessor knew that all the coal had been gotten by former workings, it would seem to be fraudulent for him to sell or lease the mine without mentioning the fact.

A defect is patent if it is sufficiently visible to "arouse the vigilance of any intending" purchaser, even though the full extent of the defect is not visible. Thus, where there were cracks in a wall, and the wall was eighteen inches out of the perpendicular, this was considered sufficient to put an intending lessee on his guard, although the full extent of the repairs necessary to be done could not be discovered without an examination of the foundations : *Cook v. Waugh*, 1860, 2 Giff. 201, 206.

A defect which is patent to a professional man (*e.g.* a surveyor), but not to an ordinary man, is not a patent defect unless

the purchaser has himself the requisite professional knowledge, or has employed a professional man : *Tildesley v. Clarkson*, 1862, 30 Beav. 419, 430.

Other matters of fact, not being defects in the physical condition of the property, need not be mentioned. Other matters of fact.

The vendor is not bound to disclose to the purchaser the result of a recent valuation of the property. *Abbott v. Swoorder*, 1851, 4 De G. & S. 448.

Nor the fact that the vendor has previously attempted to sell the property : *Warde v. Dixon*, 1859, 7 W. R. 148. But if the vendor, on being asked as to this, wrongfully denies it, the purchaser will be entitled to relief : *Roots v. Snelling*, 1883, 48 L. T. 216.

Nor the fact that part of the rent stated in the particulars has been sometimes remitted in consequence of the tenant's complaint that the rent was excessive : *Abbott v. Swoorder*, 1851, 4 De G. & S. 448. Probably if the rent has been regularly reduced for many years past, the vendor would be held bound to disclose the fact ; otherwise his statement of the rental would be misleading.

In another case the vendor stated that the farm was let to " a tenant from year to year at a moderate and reduced rental," specifying the amount. Before the sale the tenant had written a letter to the vendor announcing his intention of giving up the farm, but no proper notice to quit had been given. It was held that the vendor was not bound to mention this letter, and that there was no misdescription as to the rental of the property : *Davenport v. Charsley*, 1886, 54 L. T. 372.

On the grant of a personal annuity, the grantor is not bound to mention the fact that he is under large pecuniary liabilities : *Adamson v. Evitt*, 1830, 2 Russ. & M. 66. The purchaser in that case was an auctioneer, and the terms of the purchase raised the presumption that the grantor was in embarrassed circumstances. On the sale of an advowson, no statement by the vendor or inquiry by the purchaser having been made as to the income of the living, the purchaser claimed compensation for an undisclosed charge in favour of Queen Anne's Bounty. The Court refused to grant compensation, chiefly on the ground that the

charge did not affect the value of the advowson, and that, even if the next presentation would be less valuable, the subsequent presentations would be more valuable : *Edwards-Wood v. Marjoribanks*, 1860, 7 H. L. Ca. 806. This reasoning is not, however, conclusive. The subsequent presentations would be more valuable not because of the charge, but because the house was in good repair. The purchaser probably knew the condition of the house ; he had seen it.

Non-disclosure of defects of title

The general rule is that the vendor must disclose the defects in his title. The exceptions are : (1) defects common to all land, or (2) to land of the same tenure ; (3) local and public Acts of Parliament ; (4) well-known customs ; and (5) mere claims. To take the exceptions first :

(1) Defects common to all land.

(1) The vendor need not mention defects to which land usually is subject.

Thus, the existence of tithe commutation rent-charge, or tithes, need not be mentioned, because, in the absence of information that the land was tithe free, an ordinary purchaser would infer that the land was subject to tithes : *Ebsworth and Tidy*, 1889, 42 Ch. D. 24. If the vendor has omitted to state that the land is subject in common with other land not belonging to the vendor to one tithe rent-charge, the purchaser cannot compel the vendor to procure an apportionment at the vendor's expense : *Ibid.* It might, consistently with this decision, be held that the vendor could not in such a case enforce specific performance ; and it may be pointed out that the liability to pay tithe on other land as well as the land bought is not such a liability as land is usually subject to.

(2) Usual incidents of tenure.

(2) Nor need he mention defects which are necessarily or usually inherent in land of the same tenure as that which is being sold. These are not, strictly speaking, "defects."

Thus, on the sale of copyholds, it is not necessary to mention that the lord's consent is requisite to enable the tenant to work minerals, because this is the same in all copyholds : per Romilly, M. R., in *Hayford v. Criddle*, 1855, 22 Beav. 477, 480.

On the sale of an under-lease, the vendor need not mention the liability to forfeiture in case of a future breach of the covenants

by the original lessee, because this liability is incidental to every under-lease : *Ibid.*

If the purchaser is informed that the property is subject to restrictive covenants he is not entitled to refuse to complete on the ground that the vendor neglected to inform him that there was a power of re-entry on breach of the covenants : per North, J., in *Dunn v. Flood*, 1885, 25 Ch. D. at p. 634.

On the sale of a remainder or reversion expectant on the death of a tenant for life, the vendor need not mention the fact that succession duty will be payable by the purchaser : see *Cooper v. Trewby*, 1860, 28 Beav. 194. Even if the sale is “free from incumbrances,” the purchaser will have to pay the succession duty : *Langham and Langham Hotel Co.*, 1890, 60 L. J. Ch. 110. But if tenant for life and remainderman are joining in a sale this fact must be communicated to the purchaser or other intimation given as to the succession duty which will become payable. And where freehold property is sold subject to leases, on the determination of which further succession duty will become payable by reason of the increase in value of the property under sect. 20 of the Succession Duty Act, the vendor will, in the absence of stipulation, have to pay such further succession duty : *Kidd and Gibbon*, (1893) 1 Ch. 695.

(3) The vendor need not mention a local and public Act of Parliament affecting the property, although the Act imposes a liability on the property. (3) Act of Parliament.

Thus, on a sale of land subject to certain drainage taxes imposed by a public Act, the Court granted the vendor specific performance without compensation, although he had omitted to mention these taxes : *Barraud v. Archer*, 1829, 2 Sim. 433 ; affirmed 2 Russ. & M. 751. In that case the land was described as “fen-land” and the purchaser was an attorney living in the neighbourhood ; on the other hand, the vendor mentioned other drainage taxes which probably threw the purchaser off his guard.

Where the rental (*i.e.* particulars) stated that the land was subject to a terminal annual charge in respect of the Lough Corrib Arterial Drainage, but omitted to state the liability to a charge for maintenance under the public Act, under the provisions of which the Lough Corrib Drainage had been effected,

the purchaser was not allowed any compensation : *Re Ryan's Estate*, 1868, Ir. R. 3 Eq. 255.

But the omission to mention a local and public Act of Parliament giving a public body a right of pre-emption was held to entitle the purchaser to rescind : *Ballard v. Way*, 1836, 1 M. & W. 520. Parke, B., described the Act as a private Act ; but sect. 128 of the Act (4 Will. IV. cxlv.) made the Act public. See, on the public character of local Acts, *Aiton v. Stephen*, 1876, 1 App. Ca. 456. The decision in *Ballard v. Way* may perhaps be supported on the special ground that the Act did not sufficiently point out what property was contained in it.

(4) Customs.

(4) The vendor need not mention any usual and well-known customs as to the rights of tenants : see *Phillips v. Miller*, 1875, L. R. 10 C. P. 420 ; or as to mining rights : Dart, p. 132.

But the omission to mention any special and unusual right of tenants different from the known custom of the country will entitle the purchaser to relief : *e.g.* the right of the tenants to be allowed market value for hay, &c., when the custom in the country is to allow "fodder value" only : *Phillips v. Miller*, 1875, L. R. 10 C. P. 420, reversing 9 C. P. 196.

(5) Claims.

(5) Mere claims put forward by third persons need not be mentioned, unless the vendor is asked whether he knows of any claims : *Brownlie v. Campbell*, 1880, 5 App. Ca. 925, 944.

On the sale of a leasehold house, the omission to mention that the lessor had given the vendor a peremptory notice to repair was held to entitle the purchaser to relief, although the purchaser knew that the house was dilapidated, and probably knew or had notice of the liability to repair : *Stevens v. Adamson*, 1818, 2 Stark. 422. In that case the purchaser was ejected by the lessor for non-compliance with the notice to repair, and would probably have been able to avoid ejection by repairing if he had known of the notice.

Except as above mentioned the vendor must disclose defects in his title. Non-disclosure of the following defects in title has been held to entitle the purchaser to relief :

Mortgages which the vendor did not intend to discharge : *Torrance v. Bolton*, 1872, 8 Ch. 118.

Ground rent to which the property was subject : *Jones v. Rimmer*, 1880, 14 Ch. D. 588.

Instances of
defects in title
which ought
to be dis-
closed.

Rent-charges or quit-rents: *Esdaile v. Stephenson*, 1822, 1 Sim. & St. 122.

Restrictive covenants: *Flight v. Booth*, 1834, 1 Bing. N. C. 370; unless waived: *Hepworth v. Pickles*, (1900) 1 Ch. 108.

The liability to repair the chancel of the parish church: *Forteblow v. Shirley*, cited in *Binks v. Rokeby*, 1818, 2 Sw. 223.

Leases to which the property is subject: *Hughes v. Jones*, 1861, 3 De G. F. & J. 307.

The absence of title to an underground cellar beneath the property sold: *Whittington v. Corder*, 1852, 16 Jur. 1034.

The lessor's right of option to determine a lease: *Weston v. Savage*, 1879, 10 Ch. D. 736.

The fact that owing to the breach of covenants by the lessee the lease was then voidable: *Penniall v. Harborne*, 1848, 11 Q. B. 368; *Brewer v. Broadwood*, 1882, 22 Ch. D. 105. The fact that other property, part of the land demised by the original lease, had been sub-demised by a lease not containing restrictive covenants in accordance with those contained in the original lease: *Waring v. Hoggart*, 1823, Ry. & M. 39.

The fact that the lease under which the property is held contains unusual covenants such as a covenant not to carry on any trade: *Haedicke and Lipski*, (1901) 2 Ch. 666. As to notice of the contents of the lease, see below, p. 246.

The fact that a material portion of the mine the lease of which was being sold was under land to which the lessor had no title: *Mostyn v. West Mostyn Colliery Company*, 1876, 1 C. P. D. 145.

The fact that an annuity, the subject of the sale, was redeemable: *Coverley v. Burrell*, 1821, 5 B. & Ald. 257.

The fact that a party-wall notice under the London Building Act, 1894, had been served and an award made thereon before the contract of sale, imposing liability on the owners of the property sold to pay their share of the costs of the contemplated rebuilding of the party-wall: *Carlsh v. Salt*, (1906) 1 Ch. 335. But the vendor is not, it would seem, bound to state that he has been served with a notice to pave, as such a notice might have been given at any time, and the value of the property was not affected by the fact that the notice had actually been given: see *Leyland and Taylor*, (1900) 2 Ch. 625.

CHAPTER IV

AMBIGUITY

Definition.

AN ambiguity is a statement which is literally true, but which is susceptible of another meaning, which other meaning is one which might easily occur to a person of ordinary sense exercising ordinary care.

If the true meaning is one which would not be likely to occur to a person of ordinary sense as a possible meaning, the statement is more than a mere ambiguity—it is a misleading statement or misrepresentation (see p. 11).

If the other or untrue meaning is one not likely to occur to a person of ordinary sense exercising ordinary care, then the fact that the statement is capable of being misconstrued by an extraordinarily stupid or careless person does not make it an ambiguity. The phrases used to express this are necessarily vague : “reasonably capable of misconstruction” (*Scaton v. Mapp*, 1846, Coll. 556, Knight-Bruce, V.-C.); “a matter on which a person might *bonâ fide* make a mistake” (*Swaissland v. Dearsley*, 1861, 29 Beav. 430); “in the apprehension of ordinary persons” (*Taylor v. Martindale*, 1842, 1 Y. & C. C. C. at p. 663); and conversely, “if no man with his senses about him could have misapprehended” (*Swaissland v. Dearsley*, *ubi sup.*, cited with approval by Baggallay, L. J., in *Tamplin v. James*, 1880, 15 Ch. D. 215).

A general term is not necessarily an ambiguity : per Pollock, C. B., in *Ashworth v. Mounsey*, 1853, 9 Ex. at p. 186.

Burden of proof.

If the purchaser complains of an ambiguity, he must tell the Court in what sense he understood it : see *Smith v. Chadwick*, 1884, 9 App. Ca. 187, which was the case of a misrepresentation in the prospectus of a company. There the misrepresentation

complained of was, "the present value in the turnover or output of the entire works is over one million sterling per annum." The plaintiff, on being asked what meaning he attached to these words, replied: "I understand the meaning of such misrepresentations to be that which the words composing them obviously convey, and I am unable to express in any other words what I understood to be the meaning thereof." His action was dismissed.

So, too, in *Vignolles v. Bowen*, 1847, 12 Ir. Eq. 194, where the purchaser in his affidavit merely submitted to the Court that the true construction of the particulars was so and so, but did not say positively that he was misled: see p. 198 of the report.

The purchaser must swear that he was misled, and he may be contradicted: *Swaisland v. Dearsley*, 1861, 29 Beav. 430. If the purchaser is proved to have known the true state of the facts, he will not be entitled to relief: see p. 67. This proof may be established by parol evidence. So also, if the purchaser was deceived, but the mistake did not influence his choice, he cannot complain: see p. 72.

The following cases exemplify what are ambiguous descriptions and what not: Instances.

The description of an under-lease as a "lease" is an ambiguity amounting to a misdescription, and entitling the purchaser to relief, unless he knew or had notice of the fact that he was only to get an under-lease: *Madeley v. Booth*, 1848, 2 De G. & S. 718. A *dictum* of Jessel, M. R., in *Camberwell, &c. v. Holloway*, 1879, 13 Ch. D. 760, dissenting from *Madeley v. Booth*, was disapproved by the Court of Appeal in *Beyfus and Masters*, 1888, 39 Ch. D. 110.

The expression "derivative lease," used to describe an under-lease of property which is part only of property comprised in the superior lease, is ambiguous, as it might be taken to mean simply an under-lease: *Brumfit v. Morton*, 1857, 3 Jur. N. S. 1198.

The expression "the vendor's interest in the lease held by him of ——" is not a misdescription, even though the vendor has only an under-lease: *Waring v. Scotland*, 1888, 59 L. T. 132. But "two messuages held by an indenture of lease dated, &c."

is a misdescription if the indenture is only an under-lease : *Broom v. Phillips*, 1896, 74 L. T. 459.

Where land in Ireland was described as held by lease “for three lives and thirty-one years,” being really held for three lives and so many of the thirty-one years as should be unexpired at the death of the surviving life, it was held that there was no ambiguity, such tenure being frequent in Ireland : *Vignolles v. Bowen*, 1847, 12 Ir. Eq. 194. It also appears that the purchaser’s evidence as to his having been misled was not sufficient : see pp. 198 and 199 of that report.

The words “held for the remainder of a term of fifty-four years” are ambiguous, and their natural meaning would seem to be that fifty-four years, the remainder of an unnamed term, was being sold, and not an unnamed term the remainder of an original term of fifty-four years : *Gardiner v. Tate*, 1876, 10 Ir. R. C. L. 460, at p. 474.

Ambiguity
corrected by
other state-
ments.

In the case of a mistake caused by a mere ambiguity, the vendor is entitled to rely on any statements in the particulars or conditions from which the purchaser could have inferred the truth.

Thus, where an under-lease was described as a “lease,” but the conditions mentioned an outstanding term of three days, and referred to the lease, and stated that “the purchaser shall be deemed to have bought with full notice” of everything contained in the lease, and the lease contained a covenant by the lessee to permit “the superior landlord” to enter, it was held that the ambiguity of the word “lease” was cured by the conditions : *Camberwell case*, 1879, 13 Ch. D. 754.

The same rule as to an ambiguity applies in the case of misrepresentation in the prospectus of a company ; the statement, if merely ambiguous, may be corrected by a reference to the articles of association : *Hallows v. Fernie*, 1868, 3 Ch. 467.

CHAPTER V

MAP OR PLAN

THE purchaser is affected with notice of facts stated in the sale plan, if it is incorporated in the agreement, or is referred to, and a sufficient opportunity of inspection afforded.

Where the title map (to which the particulars referred, and a tracing of which was in the sale room) and the admeasurement given in the particulars themselves showed that a yard adjacent to, and used with, the premises was not included in the sale, the purchaser, who, from his knowledge and inspection of the premises, thought he was buying the yard, and had not looked at the map, was compelled to complete : *Tamplin v. James*, 1880, 15 Ch. D. 215.

If there is an actual misdescription in the particulars, a reference to a plan will not correct the misdescription unless the purchaser as a fact inspects the plan and discovers the mistake before the sale : *Re Arnold*, 1880, 14 Ch. D. 270. Plan *versus* particulars.

A verbal declaration by the auctioneer that the property is sold by the particulars, and not by the plan, will not be sufficient to disentitle the purchaser to rescind on the ground that he was misled by the plan : *Pope v. Garland*, 1841, 4 Y. & C. at p. 404.

Where the extent of the property sold is clearly and correctly defined by the sale plan, a misstatement of the acreage in the particulars will not be considered as within the words "mistake in the description of the property" contained in a condition for compensation : *Orange to Wright*, 1885, 54 L. J. Ch. 590.

If the plan shows trees and shrubs which do not exist, and the particulars describe the demesne as "tastefully laid out," this is not mere puff, it is misdescription : *Mazennis v. Fallon*, 1829, 2 Mol. 589. Trees.

Misleading
appearance
of property.

If the appearance of the property itself is misleading, the fact that the plan is correct is not enough ; there should be an express statement, either in the plan or in the particulars, correcting the inference to be drawn from the look of the property.

Thus, where the true boundary fence was hidden by shrubs, and the property appeared to extend to an iron fence beyond the shrubbery, the purchaser was relieved, although the plan was correct : *Denny v. Hancock*, 1870, 6 Ch. 1, where Mellish, L. J., said, " The relative situations of the real and apparent boundaries should not merely be shown on the plan, but express words should be inserted in the particulars describing the real boundary."

Gateway.

Where there was an open archway under part of the house, the lease whereof was being sold, and the archway was described " gateway " on the ground plan in the lease, this was held to be notice to the purchaser of the existence of a right of way, even though the adjoining plots had not been built over : *Davies v. Sear*, 1869, 7 Eq. 427. The conveyance to the purchaser contained no reservation of a right of way, but the right was held to have been reserved.

Where a carriage-way was marked on the sale plan, but footways were not marked, the fact that certain gates were marked was not considered as giving the purchaser notice of the footways through them across the land : *Dykes v. Blake*, 1838, 7 L. J. C. P. 282 (see argument for vendor at p. 285).

Road or
footway.

Where a road or footway over which third persons have a right of way is delineated on a plan without any indication of a right in third persons, this is not a sufficient description of the property to preclude the purchaser from requiring compensation for the existence of the right of way : *Ashburner v. Sewell*, (1891) 3 Ch. 405.

Although a footway across the property has been held to be a patent defect, yet if the vendor shows a plan of the property without the footway being marked thereon, the purchaser will be relieved, probably on the ground that the misrepresentation made by the plan negatives the notice which the purchaser would otherwise have from the outward appearance of the property. See *Dykes v. Blake*, 1838, 4 Bing. N. C. 463, where, however, there was an additional misrepresentation, the vendor

having described the land as "building land," and the plan showed a carriage-way and therefore purported to show rights of way generally.

In an early case at law, in which there was a condition for compensation, it was held that a description on a map showing as a turnpike road immediately adjoining the property offered for sale that which was in reality only a footpath, there being no road within a quarter of a mile, was not, in the absence of fraud, such a misdescription as would entitle the purchaser to rescind : *Wright v. Wilson*, 1832, 1 Moo. & R. 207. This case would now probably not be followed.

Where on a sale in lots with a statement that "a right of way will be granted to every purchaser over the path at the back" there is a plan on which four feet at the rear of each lot is shown as the path, but the whole, including the four feet, is coloured red, and there is a condition that every conveyance shall contain a covenant by each purchaser to pay a fair proportion of the cost of maintaining the path at the rear of each lot, the inference is that the soil of the four feet at the rear of each lot is to be conveyed to the purchaser of that lot : see *Lindsay and Forder*, 1895, 72 L. T. 832. And if all the purchasers desire to take their lots without any right of way over the path, each of them will be entitled to an absolute conveyance of the whole of his lot, including the four feet in rear : *Ibid*.

Upon a sale in lots, a delineation on the sale plan of intended roads does not in itself amount to a representation or undertaking by the vendor that the roads shall be made : *Randall v. Hall*, 1851, 4 De G. & Sm. 343. And a purchaser of one lot is not entitled to a right of way over all the roads, but only to a right of way to the nearest highway : *Ibid*.

The mere fact that the plan shows adjacent land of the vendor with a road delineated thereon marked "Proposed road" bounding the property sold does not entitle the purchaser to have the road made or to have the site of the proposed road kept as an open space : *School Board for London and Foster*, 1905, 87 L. T. 700. See too *Whitthouse v. Hugh*, (1906) 2 Ch. 283, where, however, the vacant space, though roughly made up as a road, was not named in the plan as a road.

Intended
roads.

A plan showing two roads of access over the vendor's land to the land sold does not entitle the purchaser to a grant of a right of way over both roads : *Bolton v. Bolton*, 1879, 11 Ch. D. 968.

But where the vendor undertook to make good and sufficient roads over the land, and there was no plan showing the intended roads, it was held that the undertaking was not satisfied by the vendor making a road up to the purchaser's lot merely, although no other houses but the purchaser's had been built : *Mason v. Cole*, 1849, 4 Ex. 375.

Where land was described as "approached by Cuddington Avenue, a new road (made up and sewerred), which is continued across the property," and there was a plan attached to the particulars delineating Cuddington Avenue, and in dotted lines its continuance over the estate, it was held that this amounted to a representation that the continuation of the road was in the same condition as Cuddington Avenue, which had gravel with a foundation of chalk, and two footpaths, one gravelled and the other not : *Re Chifferiel*, 1888, 40 Ch. D. 45.

An undertaking to make the roads marked on the plan is not sufficient to bind the vendor to make them of the same width : *Nurse v. Seymour*, 1851, 13 Beav. at p. 269. But where there is a general building scheme, and the conditions state that "the land is set out with good roads, and would afford frontages eligible for the erection of genteel residences of a superior description," and the sale plan delineates the intended divisions of the property by new roads, and the conditions state that "the proposed plan by which the lots will be sold secures to each lot wide and handsome roads," it is not competent to the vendor to divide the land in a different manner, "so as to attract an occupancy and population entirely different from that which would have been produced by acting on the plan proposed and held out at the sale" : *Peacock v. Penson*, 1848, 11 Beav. 355.

Waterway.

The delineation on the sale plan of a water drain from lot A to lot B does not amount to a representation or undertaking by the vendor that the conveyance of lot A shall reserve a right of water-way in favour of the purchaser of lot B : *Fewster v. Turner*, 1841, 11 L. J. Ch. 161.

The delineation of adjacent portions of the vendor's property does not amount to an undertaking with the purchaser that they shall remain unaltered, *e.g.* by building. The plan merely shows the relative position of that part which the vendor is about to sell: *Squire v. Campbell*, 1836, 1 Myl. & Cr. at p. 478. Restriction
of user of
adjacent land.

In that case a plan had been exhibited to an intending lessee, showing a wide area of adjacent land to the south not built over. The lessee, after taking a lease describing his land as "fronting towards the south on a new street now being formed," but not containing a similar plan or referring to the width of the street or containing any covenant relating to the adjacent land, claimed to be entitled to restrain the erection of a statue on the adjacent land on the further side of the new street. It was held that he was not entitled to restrain the erection of the statue, partly on the ground that even if the exhibition of the plan amounted to a contract, such parol contract merged in the written contract to take a lease, and both merged in the deed creating the lease, but also on the ground that the mere exhibition of the plan did not amount to an undertaking that the adjacent land should continue in the same state as shown on the plan.

The preparation by the vendor and exhibition to the purchaser of a plan of a building estate, showing plots with houses built on them, will not be sufficient to justify the purchaser in assuming that the whole estate is subject to a building scheme that each plot shall be built on strictly in accordance with the indications on the plan: *Tucker v. Fowles*, (1893) 1 Ch. 195.

On a sale in lots of what appeared to be the whole of the vendor's "M. estate," the vendor reserved a small piece of land. On the plan the lots were coloured, and the names of adjoining owners printed, but the vendor's name was not printed on the piece reserved. The sale was subject to restrictive conditions as to trades, public houses, &c., affecting the whole of the lots, and it was reasonably certain that no public house would be erected on any of the adjoining property except on the reserved piece. A purchaser of a lot near the reserved piece refusing to complete unless the vendor would subject the reserved piece to the same restrictions against public houses, the vendor's action for

specific performance was dismissed : *Baskcomb v. Beckwith*, 1869, 8 Eq. 100.

Reservations. In order to enable the vendor to reserve to himself the right to build on adjacent land so as to interfere with the lights in a house the subject of the sale, it is not enough that the plan should show the adjacent land, marking it "Building land," unless the land is so small that any building thereon would necessarily interfere with the lights in question : see *Bromfield v. Williams*, (1897) 1 Ch. 602 (plan on conveyance).

CHAPTER VI

NOTICE

IN the absence of any misrepresentation, or positive misstatement, the purchaser cannot complain that he was misled where he is fixed with notice of the true state of facts.

The purchaser has notice :

- (i) Of patent defects : see p. 31.
- (ii) Of facts stated in the particulars, or in the plan incorporated with the agreement for sale : see, as to plan, p. 43.
- (iii) Of the contents of documents to which the purchaser is expressly referred by the particulars or conditions (provided reasonable opportunity is offered to inspect the documents), except so far as those contents consist of matters which ought to be set out in the particulars : see below, p. 246.

Of what things purchaser has notice.

Except in the classes of cases above referred to, the purchaser is not affected with notice unless he has actual knowledge.

Where purchaser not affected by notice.

The following are instances of cases in which a purchaser is not affected with notice :

The mention of incumbrances in the conditions of sale is not notice to the purchaser that the property is sold subject to the incumbrances ; they must be mentioned in the particulars : *Torrance v. Bolton*, 1872, 8 Ch. 118.

Where the property is simply described as “ held for the residue of a term of — years, from —,” and no mention is made of the rent in the particulars, a reference in the conditions to the lease under which the property is held, and a stipulation that the purchaser shall pay the rent, is

not notice of the fact that the property is subject to rent reserved by the lease : *Jones v. Rimmer*, 1880, 14 Ch. D. 588.

A condition precluding the purchaser from objecting to a specified under-lease, or any other under-lease, or tenancy prior to the said under-lease, does not affect the purchaser with notice of any under-lease other than the one specified. See *Edwards v. Wickwar*, 1865, 1 Eq. 68.

Notice of a tenancy is not notice, as between the vendor and the purchaser, of the fact that the tenant has a lease : *Caballero v. Henty*, 1874, 9 Ch. 447. So, the statement that the property is "in the occupation of A. B. and others" is not notice that the property is subject to leases to these persons for lives : *Hughes v. Jones*, 1861, 3 D. F. & J. 307. The decisions to the contrary in *James v. Lichfield*, 1869, 9 Eq. 51 ; *Martin v. Cotter*, 8 Ir. Eq. R. 147 ; and *Carroll v. Keayes*, 1873, 8 I. R. Eq. 97, are probably wrong.

The statement that a farm is let to A. is not notice to the purchaser of an agreement which the vendor has entered into with A. to pay him for hay, straw, and manure, as an outgoing tenant at a valuation higher than usual in the district : *Phillips v. Miller*, 1875, L. R. 10 C. P. 420.

Knowledge or notice that the property is in the occupation of the vendor's mother is not, as between the vendor and purchaser, notice of the fact that she is tenant for life : *Nelthorpe v. Holgate*, 1844, 1 Coll. 203.

The lessee of a house purchasing the reversion is not held to have notice that the cellar is not the lessor's property merely because it was not in the lessee's occupation : *Whittington v. Corder*, 1852, 16 Jur. 1034.

The purchaser is not affected with notice of a defect in the vendor's title simply because he resides in the neighbourhood, and the vendor's title is well known there : see *Pegler v. White*, 1864, 33 Beav. 403.

Notice of a covenant is not notice of the fact that the covenant has been broken : *Ellis v. Rogers*, 1885, 29 Ch. D. 661.

And the effect of notice of restrictive covenants contained in a lease is nullified if, at the time of the sale, a trade prohibited by the restrictive covenants is being actually carried on upon

part of the demised premises. In such a case the purchaser is considered as "justified in assuming that the premises were lawfully in the condition in which he saw them": *Spinner v. Walsh*, 1847, 11 Ir. Eq. R. 597.

A statement on the sale of a life interest that the vendor guarantees the insurance of the life at the rate of 5 guineas per cent., a rate which the purchaser knew to be higher than the ordinary rate, is not sufficient to fix the purchaser with notice that the life is unhealthy: *Brealey v. Collins*, 1831, You. 317.

A statement in the particulars or conditions that the land has been enfranchised under the Copyhold Acts would probably not be sufficient notice of the fact that the vendor has no title to the minerals: see *Bellamy v. Debenham*, (1891) 1 Ch. 412, 420. But an agreement by the vendor of copyholds to procure an enfranchisement under the Copyhold Acts, and convey the freehold to the purchaser, would be notice to the purchaser that he will have no title to the minerals: *Kerr v. Pawson*, 1858, 25 Beav. 394.

If the misdescription complained of amounts only to an ambiguity (see p. 40), the vendor is entitled to rely on any statement contained in the conditions (still more, any statement contained in the particulars) which would explain the ambiguity. Thus, where an under-lease was described as a "lease," but there was a condition referring the purchaser to the lease, and another condition mentioning an "outstanding term of three days," the purchaser was held to be affected with notice of the matters contained in the conditions which explained the ambiguity: *Camberwell, &c. Society v. Holloway*, 1879, 13 Ch. D. 754.

But a mere reference to another document which, if carefully read, would explain the ambiguity is not sufficient. Thus a condition that the purchaser is to buy with full notice of the lease under which the vendor holds will not be sufficient to affect the purchaser with notice that what the vendor sells as a "lease" is only an under-lease: *Broom v. Phillips*, 1896, 74 L. T. 459.

CHAPTER VII

MISTAKE

THIS chapter deals only with mistake relating to the subject-matter of the contract.

Mistake relating to the person of the other party, and mistake as to the written contract (*i.e.* mistake in reducing the contract to writing, or mistake as to the contents of the document signed), are beyond the scope of this book.

Mistake is treated of in this chapter under the three headings : (i) of a purchaser seeking relief for his mistake ; (ii) of a vendor seeking relief for his mistake ; and (iii) of "common mistake." The third heading is not *in pari materiâ* with the other two, but it is convenient to discuss the law of common mistake separately, although logically it comes under both of the other headings. It will be seen that a mistake common to both parties is not necessarily a "common mistake," and that the essence of a "common mistake" is not that it is shared by both parties, but that it is a mistake going to the root of the matter, or a mistake involving great hardship.

(i) *Purchaser seeking relief on ground of mistake*

Purchaser's
mistake.

As a general rule, the purchaser will not be relieved on the ground of a mistake made by himself, and not caused by the vendor : *Tamplin v. James*, 1880, 15 Ch. D. 215. But where the vendor is suing for specific performance, it must be remembered that specific performance is granted or withheld according to the "discretion" of the Court, and "it would be dangerous to attempt an exhaustive definition of the cases in which the Court will refuse specific performance" : per Brett, L. J., *ibid.* at p. 221.

It might, perhaps, be suggested that the Court will not compel the purchaser to complete if there was some reasonable excuse

for his mistake : see *Tamplin v. James*, 15 Ch. D. at pp. 221, 222. But even this qualification would seem to be doubtful. Where a house, not in Regency Square, but called "No. 39, Regency Square, Brighton," was put up for sale under that appellation, the purchaser, who bought in the expectation of having a house in the Square, was held to his bargain : *White v. Bradshaw*, 1851, 16 Jur. 738. The mistake was a very natural one, and one admitting of "reasonable excuse." Perhaps the *dicta* as to the discretion of the Court in decreeing specific performance may all be referable to hardship, and the rule may be laid down that, except in cases of unusual hardship, the purchaser will be compelled to complete in spite of his mistake. The amount of hardship must be left undefined. There would certainly seem to be great hardship in the Regency Square case.

Where the purchaser made a mistake through relying on statements contained in the "first edition" of the particulars of sale, which contained no conditions of sale, and would have discovered his mistake if he had read the second edition, of which three times as many copies had been printed, the vendor distributing them widely and calling the attention of purchasers to them, no relief was given to the purchaser : *Goddard v. Jeffreys*, 1881, 51 L. J. Ch. 57. But where the purchaser mistook which lot was being sold, and bid for a lot he did not want, the vendor's bill for specific performance was dismissed without costs : *Malins v. Freeman*, 1837, 2 Keen, 25. But in a similar case, Kekewich, J., decreed specific performance against the purchaser : *Van Praagh v. Everidge*, (1902) 2 Ch. 266 (reversed on another point, (1903) 1 Ch. 434).

Examples of
purchaser's
mistake.

Specific performance was decreed of a contract to purchase leasehold houses, although the purchaser had mistaken the effect of the covenants, and found out afterwards that the lease prohibited him from applying the property to the purpose for which he had bought it : *Morley v. Clavering*, 1860, 29 Beav. 84.

On a sale of freeholds and adjoining leaseholds in two lots, the first lot being described as freehold in occupation of R., and the second as leasehold, the purchaser of lot 2, who knew that part of the premises occupied by R. and included in lot 1 was

leasehold, and bought in the expectation that that leasehold part would be included in his lot, was held not entitled to have the leasehold part of lot 1 conveyed to him or to receive compensation, as his mistake was not caused by the vendor: *Fairhead v. Southee*, 1863, 11 W. R. 739.

Where the purchaser, who was personally acquainted with the property, mistook the extent of the property offered for sale, trusting to his own knowledge, and not looking at the particulars, which would have undeceived him, he was compelled to complete notwithstanding his mistake: *Tamplin v. James*, 1880, 15 Ch. D. 215.

Where the purchaser bought land 176 feet deep in order to build a carriage factory, and discovered afterwards that owing to the Metropolis Management Act he would be unable to build higher than 12 feet for a space of 62 feet from the street, the vendor's bill for specific performance was dismissed, but without costs: *Bray v. Briggs*, 1872, 20 W. R. 962. Lord Romilly decided the case simply on the ground of mistake; but it may be noticed that the vendor had himself contributed to the mistake by advertising the property as fit for "a carriage factory or any building requiring space," and by telling the purchaser he could build within 5 feet of the road.

Vendor's
silence.

The mere fact that the purchaser has made a mistake as to the property, or the nature of the property, and that the vendor knows of this mistake, does not put upon the vendor the duty of correcting the mistake: see *Morley v. Clavering*, 1860, 29 Beav. 84.

When it is said, as in Dart, p. 101, that there may be a "silence which is as eloquent as words," this means a silence upon which the purchaser relies; for instance, the silence of the vendor when the purchaser makes a statement in the vendor's presence expecting the vendor to contradict him if he is mistaken. The passive acquiescence of the vendor in the purchaser's self-deception would not, of itself, entitle the purchaser to avoid the contract: see *Smith v. Hughes*, 1871, L. R. 6 Q. B. 597, a case of a sale of chattels without warranty. If, however, the vendor not only knows what the purchaser has in his mind, but knows that the purchaser is aware that he knows it,

then the mistake of the purchaser is caused by the vendor's conduct, and the purchaser will be relieved even though the vendor has made no active misrepresentation : *Ibid.*

If the vendor makes a misrepresentation to a third person, and that third person to the vendor's knowledge communicates the misrepresentation to the purchaser, the vendor is treated as having himself made the misrepresentation : *Pilmore v. Hood*, 5 Bing. N. C. 97.

(ii) *Vendor seeking relief on ground of mistake*

Vendor's
mistake.

As a general rule, mistake, other than "common mistake," is no ground for relieving the vendor from the contract. A vendor is bound by the description of the property which he gives in the particulars of sale.

"Any person, however unconversant in the actual situation of his estate that will give a description, must be bound by that, whether cognizant of it or not" : per Lord Thurlow in *Calverley v. Williams*, 1790, 1 Ves. jun. at p. 213. The vendor is said to know the real facts, because he undertakes to know by undertaking to give a description : *Ibid.* p. 212.

Where, on a sale by the Court, the timber to be taken at a price to be named, the vendor afterwards found that the auctioneer in naming the price had made a mistake, omitting to reckon the value of a large portion of the timber, it was held that the purchaser was entitled to the timber at the price named, and that the vendor was not entitled to relief on the ground of mistake : *Griffiths v. Jones*, 1873, 15 Eq. 279.

But specific performance will not be granted where there would be a great hardship imposed on an innocent vendor or lessor by reason of some mistake which he has made, although the other party has not contributed to it : *Hexter v. Pearce*, (1900) 1 Ch. at p. 346. Thus, in *Baxendale v. Seale*, 1854, 19 Beav. 601, the vendor was relieved from a contract to sell a manor with "all the lord's rights," when he discovered that certain valuable rights belonged to the manor which he had no intention of selling, and which he never thought belonged to the manor. Similarly, where the vendor by mistake described his property as containing 21,750 acres, when it contained only

Hardship.

half that quantity, the Court refused to grant the purchaser specific performance with abatement : *Durham v. Legard*, 1865, 34 Beav. 611. So, again, where the vendor by mistake offered the property for £1,250 instead of £2,250, specific performance was not decreed against him : *Webster v. Cecil*, 1861, 30 Beav. 62. Specific performance has also been refused where, through mistake, the auctioneer has not bid to prevent a sale at an under-value (*Day v. Wells*, 1861, 30 Beav. 220) or the puffer employed by the vendor has not bid (*Mason v. Armitage*, 1806, 13 Ves. 25). See, further, the cases of "common mistake" mentioned below and the cases of hardship at p. 101.

"Common mistake."

(iii) *Common mistake*

If there has been what is called a common mistake, the Court will relieve either party from the contract, even though the contract has been completed by an actual conveyance of the property.

The phrase "common mistake" is an instance of what has been termed legal shorthand ; it expresses something more than the literal meaning of the words themselves. Taken literally, the words merely mean a mistake in which both parties share, and the phrase is used in antithesis to a unilateral mistake. But when it is said that the Courts will relieve in case of common mistake, it is not meant that where both parties have made the same mistake the Courts will relieve either of them from the contract. Every misdescription innocently made by the vendor, and believed in by the purchaser, is a mistake common to both parties, but it is not necessarily a "common mistake" in the language of lawyers. The condensed phrase "common mistake" might be enlarged thus : "mistake common to both parties, and of such a nature that to enforce the contract would inflict very great hardship on one of the parties." It is true that where relief is given for a common mistake the Courts do not expressly advert to the question of hardship. As a rule it is the subject-matter of the mistake which is considered. Thus, it is sometimes said that the mistake is "as to the subject-matter of the contract," and that "the parties were not *ad idem*," or (as in *McKenzie v. Hesketh*, 1877, 7 Ch. D. at p. 682, per Fry, J.) that the mistake "goes to the *corpus* with which the contract

deals," or is "a mistake as to the essential terms of the contract," or (as in *Re Tyrell*, 1900, 82 L. T. 675) is an "error in the substance of what is purchased."

In the absence of further definition, these phrases do not help us much to an explanation of what is meant by a common mistake. Is, for instance, a mistake as to acreage one which goes to the *corpus* or not? If the vendor, having 100 acres of land, by a slip describes it as 200, is this a mistake as to the essential terms of the contract or not? In *McKenzie v. Hesketh*, 1877, 7 Ch. D. at p. 682, Fry, J., said that a mere difference in quantity had never been held to be a bar to specific performance. But the learned Judge must have forgotten the case of *Durham v. Legard*, 1865, 34 Beav. 611, stated above, p. 56. If the phrase "mistake as to the *corpus*" means anything, it would seem to mean a "mistake as to the whole of the subject-matter"; so that no relief would be given on the ground of a mistake affecting part only of the subject-matter, however large that part might be. The cases of *Durham v. Legard* and *Baxendale v. Seale* (see p. 55) do not support this view; probably the phrase "mistake as to the *corpus*" should be reserved for cases where rescission is asked for after completion.

Further, there may be a mistake common to both parties and affecting the whole of the subject-matter, and yet not one for which the Court would relieve (as on a "common mistake") after conveyance. "If A. sells an estate, believing himself to have a good title when he has not, and B. pays for it, believing the same thing, that is a mutual mistake; but it is a mutual mistake for which the purchaser will have to suffer, because, when he once takes a conveyance and pays his purchase money, there is an end to the matter": per Malins, V.-C., in *Allen v. Richardson*, 1879, 13 Ch. D. at p. 543.

The existence of a reversionary lease not known to either vendor or purchaser and making the freehold only half as valuable, does not justify rescission after completion: *Re Tyrell*, 1900, 82 L. T. 675. In that case it was the vendor who wished to rescind in order to escape his liability to the purchaser under the covenants for title; the fact of the value of the property is not stated in the report.

The absence of title to part of the property sold and the fact that the purchaser had to pay 300*l.* and costs in order to acquire a title to that part was held not to constitute a “common mistake” or to entitle the purchaser to any relief after completion : *Debenham v. Sawbridge*, 1901, 2 Ch. 98.

The cases of “common mistake” have usually been cases in which the property, or the right of the vendor, had been destroyed before the contract, or in which the thing sold belonged all the time to the purchaser, or in which the interest of the vendor had been completely changed before the contract.

Examples.

A purchaser buying what afterwards turns out to have been his property all the time, is relieved from his bargain, even after the execution of the conveyance : *Bingham v. Bingham*, 1748, 1 Ves. sen. 126 ; *Jones v. Clifford*, 1876, 3 Ch. D. 779. And the fact that the purchaser might have discovered his rights from the abstract makes no difference : *Bingham v. Bingham*, *ubi sup.*

Similarly, a person contracting to take a lease of what he afterwards discovers was his own property at the time of the contract : *Cooper v. Phibbs*, 1867, L. R. 2 H. L. 149.

A purchaser of a remainder in fee expectant on an estate tail was relieved, even after conveyance, as the remainder had before the contract been destroyed by the tenant in tail executing a disentailing assurance : *Hitchcock v. Giddings*, 1817, 4 Pri. 135.

A vendor of a reversionary interest, which, though he was not aware of the fact, had at the time of the contract fallen into possession by the death of the tenant for life, was relieved from his bargain : *Colyer v. Clay*, 1843, 7 Beav. 188.

A vendor of a life policy, on discovering that the assured was dead at the date of the contract, is entitled to have the transaction set aside even after completion : *Scott v. Coulson*, (1903) 1 Ch. 453.

A purchaser of a life annuity is entitled to recover his purchase money if at the time of the contract the annuitant was dead : *Strickland v. Turner*, 1852, 7 Exch. 208.

Similarly, the purchaser of an estate which at the time of the contract had been swept away by a flood : *semble*, *Hitchcock v. Giddings*, 1817, 4 Pri. at p. 111.

The mistake upon which the relief is founded must be a mistake as to a matter of fact, not a mistake of law. Mistake of law.

A mistake as to private rights may be a mistake of fact, not of law. Thus, a person entitled to a fishery, thinking it belonged to three other persons, and never having examined his title, agreed to rent it from them, but on discovering his mistake was held entitled to be relieved from the agreement : *Cooper v. Phibbs*, 1867, L. R. 2 H. L. 149. See above, p. 19, as to the distinction between misrepresentation of law and misrepresentation of fact.

The mere fact that the vendor's description is vague will not prevent the Court from relieving him, if he had a definite notion of the extent of the subject-matter of the sale. Vagueness of vendor's description.

Thus, where the vendor of a manor, "including all the lord's rights," discovered after the contract that several valuable rights over lands not in the parish in which the manor was situate belonged to the manor, the Court relieved him on the ground of mistake : *Baxendale v. Scale*, 1854, 19 Beav. 601.

If in that case both vendor and purchaser had intended the sale to be of a mere doubtful right, the extent and value of which was understood to be unknown to both, then the fact that the sale afterwards became disadvantageous to the vendor would not have affected the contract. But both parties intended the sale to be of something definite, though they did not necessarily form the same conception of the extent of the property which would be comprised.

Even in a case of common mistake the purchaser could not recover the purchase money from a bare trustee who has sold and conveyed under the order of the Court, and has not himself received the purchase money : per Byrne, J., in *Debenham v. Sawbridge*, (1901) 2 Ch. 98. Relief against trustee.

CHAPTER VIII

FRAUD

It was formerly considered that, though misrepresentation without fraud was sufficient as a defence to an action for specific performance, fraud was necessary to entitle the purchaser to rescission : Sug. 244. It is now, however, settled that an innocent misrepresentation will entitle the purchaser, if the contract has not been completed, to have the contract rescinded and the deposit returned (*Torrance v. Bolton*, 1872, 8 Ch. 118) unless the misdescription was in a non-essential matter, in which case the purchaser may recover compensation. And in addition to his deposit the purchaser can recover his expenses of investigating the title, but not (in the case of an innocent misrepresentation) damages for the loss of his bargain : see below, p. 130. If the contract has been completed the purchaser has no relief for an innocent misrepresentation (*Brownlie v. Campbell*, 1880, 5 App. Ca. 936) unless the condition for compensation applies : see below, p. 152.

If the vendor has made a fraudulent misrepresentation the purchaser can have the contract rescinded after completion ; he can recover compensation even without any condition allowing compensation and even after completion ; he can, in addition to recovering his deposit and expenses, recover damages for the loss of his bargain (see below, p. 130), and he can refuse to complete even if the misrepresentation is non-essential, and that, too, notwithstanding a condition that misstatements shall not annul the sale but compensation be given (see below, p. 285).

But even a fraudulent misrepresentation will not entitle the purchaser to relief, unless it was one *dans locum contractui* : see below, p. 77.

A fraudulent misrepresentation may be defined as a false statement made by a person knowing it to be false, or not believing it to be true, or not caring whether it be true or false : *Derry v. Peek*, 1889, 14 App. Ca. 337, 374. An attempt was made by the Court of Appeal in *Peek v. Derry*, 37 Ch. D. 541, to extend the definition of fraudulent misrepresentation so as to include a false statement made by a person who has no reasonable ground for believing the statement to be true. But the decision of the Court of Appeal was reversed by the House of Lords, which held that the absence of reasonable ground was not sufficient in itself to make a statement fraudulent. See 14 App. Ca. at p. 369, and cf. *Western Bank of Scotland v. Addie*, 1867, L. R. 1 H. L. Sc. at p. 168.

If a misstatement has been fraudulently made, the vendor's motive is immaterial, the misstatement is none the less fraudulent because the vendor had no intention to overreach : see *Derry v. Peek*, 1889, 14 App. Ca. at p. 374. This is, perhaps, the reason why the expression "legal fraud" was invented. In popular language, no man is guilty of fraud unless he intended to cheat, but in law a man is responsible for his acts no matter how innocent his motives. The phrase "legal fraud" is an admission of the difference which exists between legal and popular language, and is designed to spare the feelings of a person who, though guilty of fraud, was innocent of an intention to overreach.

Where the vendor described copyhold land as "freehold," having been informed when he himself bought the land, together with other land, that part of it was copyhold, but not having inquired which part was copyhold, he was held to have committed a legal fraud, and the purchaser was relieved even after completion : *Hart v. Swaine*, 1877, 7 Ch. D. 42 (more fully stated below).

A misrepresentation innocently made becomes fraudulent if the vendor afterwards discovers his mistake, and does not correct it : *Brownlie v. Campbell*, 1880, 5 App. Ca. at p. 950.

In *Hart v. Swaine*, 1877, 7 Ch. D. 42, the vendor, selling freehold and copyhold property, described it as freehold. He had

Definition.

Motive.

Fraudulent
ex post facto.Fraudulent
misstatement
as to title.

previously bought it with some other property, the whole being then described as "about three-fourths freehold and one-fourth copyhold," but there was nothing in the abstract to show that any part was copyhold. He afterwards sold part of the property to S., and entertained a vague notion either that no part of what he had bought was copyhold, or that what he sold to S. was the copyhold part. The Court held the representation to be fraudulent, and rescinded the contract, although the conveyance had been executed. *Hart v. Swaine* "was a case in which a representation that land was freehold, which in point of fact was copyhold, was made under circumstances bringing home knowledge, as strongly as anything in the world could do, to the person who made it": *Brownlie v. Campbell*, 1880, 5 App. Ca. at p. 398. Cotton, L. J., in *Soper v. Arnold*, 1887, 37 Ch. D. at p. 102, said that in *Hart v. Swaine* the Judge decided that there had been a misrepresentation amounting to legal fraud, and he treated the action as an action of deceit.

Where land sold as freehold had once been copyhold, and it was doubtful whether the lord's rights had been extinguished, and the vendor's solicitors, in answer to the purchaser's inquiry for the title deeds, had told him that there was only one title deed, which was 140 years old, "which merely shows that the property was purchased for a workhouse and no importance is attached to that document," the fact being that that document would have shown the purchaser that the land was once copyhold, and the purchaser would have been able to refuse to complete until the doubt was cleared up, the purchaser was held entitled to rescission and the return of his purchase money with interest after the conveyance had been executed by the vendors (the guardians), but before it had been confirmed by the Poor Law Commissioners. The Court said: "Even treating the conveyance as actually executed, the purchaser was entitled to be relieved": *Turner v. West Bromwich Union*, 1861, 3 L. T. o.s. 662.

In *Legge v. Croker*, 1811, 1 Ball & B. 506, the lessor had, in perfect good faith, assured the lessee that there was no right of way over the ground; that there had been formerly, but that it had been legally stopped by a presentment of the grand jury. It

turned out that there was a footway, the presentment applying only to a carriage-way, and the lessee was convicted for obstructing it. Lord Manners, in dismissing the lessee's bill to be relieved from the lease, said : " If there were a wilful misrepresentation the plaintiff might be entitled to relief, but the lessor conceived himself entitled in point of law in asserting that there existed no right of way ; it cannot be called a misrepresentation."

If a person, knowing that he has no title at all to the property, or to an essential or material part of it, and knowing that the person with whom he is contracting is perfectly ignorant of the title, contracts to grant a lease, the lessee may, on the ground of fraud, rescind after completion, even though there has been no affirmative statement made as to the title. See *Mostyn v. West Mostyn, &c. Co.*, 1876, 1 C. P. D. 145, where the lessor granted a lease of mines, a material portion of which, as the lessor knew, was situate below the low-water mark, and therefore belonged to the Crown.

In the case of a sale it can rarely happen that the purchaser, after examining the abstract, knows less about the title than the vendor himself unless the vendor has fraudulently suppressed a deed, or has commenced the title later, in order to avoid showing the defect. " Whether it would be a fraud to offer as good a title which the vendor knows to be defective in point of law, it is not necessary to determine. But if he knows and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser " : per Grant, M. R., in *Edwards v. M'Leay*, 1815, G. Coop. 308.

Usually the mere non-disclosure of claims, so far from being fraudulent, is not a matter for which the vendor is liable at all. But if it is with a fraudulent intent that the claims are concealed the vendor might be held liable : *Brownlie v. Campbell*, 1880, 5 App. Ca. at p. 944.

Concealment
of claims.

An innocent misstatement of law will not entitle the purchaser to relief (see above, p. 19), but a fraudulent misstatement of law might be differently treated. " Where there is a representation made as to a mere matter of law, it is in nineteen cases out of

Fraudulent
misrepresentation
of law.

twenty made by a person who does not know the law better than the person to whom it is made, and at whose risk it is taken and acted upon. Still I am not prepared to say, and I doubt whether a man who wilfully misrepresented the law would be allowed in equity to retain any benefit he got by such representation": per Bowen, L. J., in *West London Commercial Bank v. Kitson*, 1884, 13 Q. B. D. 360, 362.

Statement as
to other
offers.

It has been said that a false statement by the vendor that he has had such and such offers for the property will not enable the purchaser to recover damages in an action of deceit: 1 Ro. Abr. 101, pl. 16. But the reason for this is not obvious.

Employment
of agent.

Where the vendor employs an agent the vendor's liability as for fraud may be summed up in the following rules:

If the vendor authorises the agent to make a representation which the vendor knows to be untrue, the vendor is guilty of fraud.

If the agent without authority makes an innocent misrepresentation, the vendor is not liable as for fraud, although the representation would have been fraudulent if made by the vendor himself: *Cornfoot v. Fowke*, 1840, 6 M. & W. 358. If, however, the vendor knows that the agent has made a false representation, and does not correct it, the vendor will probably be liable for fraud: see *Pilmore v. Hood*, 1838, 5 Bing. N. C. 97. And if the vendor knowingly and purposely refers the purchaser to an ignorant agent for information, the vendor is liable as for fraud if the agent makes any misrepresentation: *Wilson v. Fuller*, 1843, 3 Q. B. 68; *Ludgater v. Love*, 1881, 44 L. T. 694.

If a fraudulent misrepresentation, tending to the benefit of the principal, has been made by the agent in the course of business, and acting within the limits of the authority ordinarily given to an agent in such business, the principal is liable as for fraud. The principle is thus stated by Willes, J., in the leading case of *Barwick v. English Joint-Stock Bank*, 1867, L. R. 2 Ex. 255: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, though no express command or privity of the master be proved." And, after giving instances of the application of this principle,

he adds : “ In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.” The correctness of this statement of the law has been often recognised : see *Houldsworth v. City of Glasgow Bank*, 1880, 5 App. Ca. at p. 326.

The vendor is not liable as for fraud if the fraud has been committed by the agent for his own private ends, and not for the benefit of the vendor : *British Mutual, &c. v. Charnwood Forest, &c.*, 1887, 18 Q. B. D. 714.

If the agent is not, in the transaction which is complained of as fraudulent, acting for or purporting to act for the vendor, the vendor is not liable for the fraud : *Thorne v. Heard*, (1895) A. C. 495.

If the agent commits the fraud otherwise than in the natural course of business, the vendor is not liable to an action of deceit : see *Mackay v. Bank of New Brunswick*, 1874, 5 P. C. 394. But such fraud would probably give a purchaser the right to rescind the contract even after the conveyance.

The agent who has committed a fraud is also himself personally liable to the purchaser : see *Weir v. Bell*, 1878, 3 Ex. D. at p. 248 ; and *Arnot v. Biscoe*, 1748, 1 Ves. sen. 95.

If a person represents that he is agent for the vendor when he is not, he is liable to the purchaser in damages : *Collen v. Wright*, 1857, 8 E. & B. 647.

If the vendor, or his solicitor, or agent, conceals from the purchaser any incumbrance on the property, or any settlement, deed, will, or other instrument material to the title, or falsifies any pedigree upon which the title may depend, in order to induce him to accept the title offered or produced to him, with intent, in any of such cases, to defraud, this is a misdemeanour : see 22 & 23 Vict. c. 35, s. 24. The vendor, or his solicitor, or agent, so acting will also be liable to an action for damages at the suit of the purchaser, or those claiming under him, for any loss sustained by him or them in consequence of the settlement,

Concealment
criminal.

deed, will, or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree : *Ibid.*

In estimating such damages where the estate shall be recovered from such purchaser, or from those claiming under him, regard shall be had to any expenditure by him or them in improvements on the land : *Ibid.*

In *Smith v. Robinson*, 1879, 13 Ch. D. 148, during the argument a doubt was suggested by Fry, J., whether a solicitor would be liable to the statutory penalty where the condition was that no title should be shown before a certain date and there turned out to be an incumbrance earlier than that date.

CHAPTER IX

MISDESCRIPTION DANS LOCUM CONTRACTU

THE purchaser cannot complain of the misdescription (1) if he was not deceived by it, or (2) if he was not induced by it either to purchase something which he would not otherwise have purchased, or to give a higher price than he would have given had he not been deceived.

(1) *Purchaser not Deceived by the Misdescription*

If the purchaser is not deceived by the misdescription he cannot avail himself of the fact that there has been misdescription : *Brooke v. Rounthwaite*, 1846, 5 Ha. 298. Similarly, in the absence of express agreement by the vendor to make a good title, the purchaser cannot complain of a defect (at any rate of an irremovable defect) in title which he knew of : *Ellis v. Rogers*, 1885, 29 Ch. D. 661.

The purchaser must, it is submitted—though there are expressions in *Nicol's case*, 1859, 3 De G. & J. at p. 439, and in *Torrance v. Bolton*, 1872, 8 Ch. 118, which might be construed as laying down a different rule—swear that he was deceived by the misdescription : *Smith v. Chadwick*, 1882, 20 Ch. D. at p. 45. Then the burden is on the vendor to prove that the purchaser knew the true facts or did not rely on the vendor's description.

Burden of proof.

If the misdescription complained of is a mere ambiguity, it is not sufficient for the purchaser to show that the words have two meanings : he must say in what sense he understood them. See p. 40, above.

In a contract to sell a house, not stating the nature of the vendor's interest, if the purchaser knows that the vendor is entitled only to a lease and not to the fee, he cannot resist

Instances of purchaser knowing the facts.

specific performance on the ground that the vendor did not state this in the contract : *Cowley v. Watts*, 1853, 17 Jur. 172.

Where an under-lease is described as a lease, the purchaser is not entitled to relief on account of the ambiguity if he knew beforehand that the vendor had only an under-lease : *Henderson v. Hudson*, 1867, 15 W. R. 860.

Where the vendor agrees to sell a "lease," having only a contract for an under-lease, the purchaser, who has seen the contract for the under-lease under such circumstances that he must have known he was only to have an under-lease, will be bound to accept an assignment of an under-lease made in accordance with the terms of such contract : *Flood v. Pritchard*, 1879, 40 L. T. 873.

Where the misrepresentation complained of was that the statement as to the produce of the woods was misleading, because such produce had only been made by cutting in an unhusbandmanlike manner, the purchaser was held unable to complain of the misrepresentation, because he had sent his own surveyors down, and they found out that the woods had been cut improperly, and therefore the purchaser was not misled by the statement as to the produce of the woods : *Lowndes v. Lane*, 1789, 2 Cox, 363.

Knowledge
inferred.

The purchaser's knowledge of the facts may be inferred from the circumstances, even though he denies knowledge.

The fact that the purchaser had attended a previous abortive sale by auction, where the particulars described the property as leasehold, was considered as proving that the purchaser knew that the vendor, who contracted to sell my "house," not mentioning the tenure, had a lease only, and not the fee (*Cowley v. Watts*, 1853, 17 Jur. 172); though it is not clear that the purchaser disputed that he had gained such knowledge at the auction sale.

Knowledge of an incumbrance affecting the property, but not mentioned in the particulars, was not inferred from the fact that at the sale by auction, at which the purchaser bought the property, the conditions of sale mentioning the incumbrance were read aloud, the purchaser swearing that he was seventy-three years old, very deaf, and unable to hear the conditions, and that

he did not inquire about them, thinking they were only formal : *Torrance v. Bolton*, 1872, 8 Ch. 118.

Knowledge that the land is subject to water-rights will not be presumed from the fact that the purchaser lived in the neighbourhood, was acquainted with the property, and constantly passed some wells supplied from the land contracted to be sold : *Shackleton v. Sutcliffe*, 1847, 1 De G. & S. 609.

Knowledge that the land is enfranchised copyhold is not equivalent to knowledge that the vendor has no title to the minerals : *Bellamy v. Debenham*, (1891) 1 Ch. 412, 420.

Knowledge of the acreage of the property will not be presumed from the fact that the purchaser knew the property : *Ibid.*

Knowledge of the dimensions of a house will not be presumed from the fact that the purchaser was the tenant and occupier of the house : *King v. Wilson*, 1843, 6 Beav. 124.

Where property is described as "lying within a ring-fence," but is in fact dispersed, the Court may infer that the purchaser knew the true facts from his having lived in the neighbourhood all his life : *Dyer v. Hargrave*, 1805, 10 Ves. 505.

Where the particulars stated that a person was "a healthy gentleman, aged forty-eight, whose life is insurable," the fact being that the insurance companies required a higher rate than the highest rate of insurance of a healthy life of the same age, the purchaser was not presumed to know the true state of the case, merely because there was a statement in the particulars that the vendor guaranteed the insurance at five guineas per cent., which, to the knowledge of the purchaser, was more than the usual premium : *Brealey v. Collins*, 1831, You. 317.

The vendor may show that the purchaser did not rely on the vendor's statements, but trusted to his own knowledge or supposed knowledge of the property. "If the party to whom the representations were made himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party" : per Lord Langdale, M. R., in *Clapham v. Shillito*, 1844, 7 Beav. 146.

Purchaser not
relying on
statement.

In one case, although there was a clear misrepresentation by the vendor, the Court came to the conclusion that the purchaser relied on his own knowledge and not on the misrepresentation. Property let for 100*l.*, the landlord paying the rates and taxes, which amounted to 16*l.* 9*s.*, was put up for sale as let at 100*l.* "clear of taxes and rates." The purchaser, who was an auctioneer, asked no questions about the rates and taxes, assuming that the tenant paid them, as that was the practice in London where the property was situate. In an action of deceit against the vendor, the Court held that the purchaser did not rely on the misrepresentation, "but grounded himself upon a supposed knowledge of the usual course of practice in such transactions": *Wilson v. Fuller*, 1843, 3 Q. B. 68, see p. 78 (the head note does not accurately represent the real ground of decision). This case is, however, open to grave doubts, as the direct misstatement as to the taxes could not but have influenced the purchaser.

Resort to
other means
of knowledge.

It is sometimes said, that if the purchaser has resort to other means of information, he ought not to rely, and must be taken not to have relied, on the vendor's statements, and that if he inquired, but inquired carelessly, he must bear the consequences of his own negligence: see *Clarke v. Mackintosh*, 1862, 4 Giff. 134, 155; *Attwood v. Small*, 1838, 6 Cl. & F. 232; and *Clapham v. Shillito*, 1844, 7 Beav. 146.

But if the vendor have made a positive misrepresentation, it is quite clear that the non-inquiry or insufficient inquiry of the purchaser does not preclude him from relief on the ground of the vendor's misdescription: *Redgrave v. Hurd*, 1887, 20 Ch. D. 1; *Matthias v. Yetts*, 1882, 46 L. T. 497; and see above, pp. 26, &c.

Much less can the vendor rely on the facilities given by him to the purchaser for discovering the truth if he have *intentionally* misled the purchaser: *Reynell v. Sprye*, 1852, 1 D. M. & G. 660.

Where, however, the vendors made various and inconsistent representations as to the profits of the brewery which they were selling, but gave the purchaser every facility for investigation, it was held that the inconsistency of the statements put the purchaser on inquiry: *Clarke v. Mackintosh*, 1862, 4 Giff. 134. It is probable that in that case the Court believed as a fact that the purchaser was not misled.

If it is proved that the purchaser knew the representation was partially untrue, the Court may infer that he did not rely upon the statement at all. Where the defendant described the property as standing "on a fine vein of anthracite coal, the finest vein of South Wales," and omitted to state that the vein had been partially worked and was almost exhausted, the purchaser, who knew that the coal had been partially worked, was held to be disentitled to relief for the misdescription, on the ground that he knew the description was false to a certain extent, and was therefore put on inquiry as to the extent to which the description was true : *Colby v. Gadsden*, 1865, 34 Beav. 416.

In judging whether the purchaser relied upon the representation, the Court takes into account the opportunities which the purchaser had of judging for himself, the inspection which he actually made, the fact that he was by special education, or the circumstances of his business or profession, qualified to judge, or that he employed professional advice. The Court also considers the subject-matter whether the vendor was or was not likely to know more about it than the purchaser, and whether inspection would be calculated to inform the purchaser of the true facts or not : *Clapham v. Shillito*, 1844, 7 Beav. 146 ; *Jennings v. Broughton*, 1854, 5 D. M. & G. 126 ; *Higgins v. Samels*, 1862, 2 J. & H. 465.

Purchaser's opportunities.

The purchaser's profession, and therefore special knowledge, is often a material fact in determining whether he was misled.

Special knowledge.

In *Hallows v. Fernie*, 1868, 3 Ch. 467, which was a case of a purchase of shares in a shipping company, the fact that the purchaser was a shipping agent and secretary to a company was considered important. See p. 477 of the report.

There are *dicta* in *Haywood v. Cope*, 1858, 25 Beav. 140, which seem to lay down the principle that if a purchaser has not the requisite special knowledge, he ought to employ some one who has. The question, however, is not whether the purchaser ought to have known, but whether he did know ; and this is a question of fact, not of presumption. Of course, in the exceptional case of patent defects (above, p. 31) and notice (p. 49) the purchaser's knowledge is immaterial.

Investigation
inadequate.

If the investigation made by the purchaser could not correct the misrepresentation, the fact that the purchaser investigated does not relieve the vendor from the consequences of his misrepresentation. Thus, where the purchaser, who was a lime dealer or stone mason, went with another person, who was something of a chemist and something of an architect, to inspect a lime quarry, their inspection did not fix the purchaser with notice that the lime was not of the quality described in the particulars of sale, because lime cannot be judged till it is burnt: *Higgins v. Samels*, 1862, 2 J. & H. 460.

Reliance on
misrepresentation
alone.

It is not necessary for the purchaser to prove that he relied solely upon the misrepresentation: *Nicol's case*, 1859, 3 De G. & J. 387; *Edgington v. Fitzmaurice*, 1885, 29 Ch. D. 459; and *Peek v. Derry*, 1887, 37 Ch. D. 541.

(2) *Purchaser not Influenced by the Misdescription*

If the purchaser was not induced by the misdescription to buy what he would not have bought had he known the facts, or to give a higher price than he would otherwise have given, he cannot complain of the misdescription.

In *Attwood v. Small*, 1838, 6 Cl. & F. 232, at p. 444, Lord Brougham, in describing the nature of misrepresentation against which the Court will grant relief, says: "It should be this false representation which gave rise to the contracting of the other party. *Dolus dans locum contractui* is the language of the civil law, not *dolus malus* generally; not the mere fraudulent conduct of the party trying to overreach his adversary, not mere misconduct and falsehood throughout, unless *dedit locum contractui*."

Burden of
proof.

If the misdescription is material on the face of it—that is to say, is calculated to enhance the value of the property in the eyes of any ordinary purchaser—the burden lies on the vendor to prove that the purchaser was not induced by the misdescription to buy the property or to give a higher price: *Nicol's case*, 1859, 3 De G. & J. 387. It has even been said that where a misdescription material on the face of it has been made, it is an inference of law that the purchaser was induced by it to enter into the contract: *Jessel, M. R., in Redgrave v. Hurd*, 1881, 20 Ch. D. 1, 21; and in *Matthias v. Yctts*, 1882, 46 L. T. 497, 502.

But this is putting the case too high : see *Smith v. Land Corporation*, 1884, 28 Ch. D. 7, 16 ; and *Smith v. Chadwick*, 1884, 9 App. Ca. 187, 196. If the misdescription is not material on the face of it, much more if it is of such a kind as to make the property seem to an ordinary purchaser less valuable than it is in reality, the burden lies on the purchaser to prove that the misdescription was material to *him*.

The following cases show what sort of misdescription is regarded as *prima facie* material :

The case of a misstatement of acreage is obviously a material misdescription, and the burden of proof would lie on the vendor to show that the purchaser was not induced by it to purchase the property. *Hill v. Buckley*, 1811, 17 Ves. 394. In *Leslie v. Tompson*, 1851, 9 Ha. 268, Turner, V.-C., says, "The actual designation of the number of acres negatives the presumption of any intention on the part of the vendor to sell in the lump." But it is difficult to see what difference the *vendor's* intention makes ; it is the purchaser's intention that is really in dispute in these cases.

But for the decision of Romilly, M. R., in *Ayles v. Cox*, 1852, 16 Beav. 23, the description of freehold land as "copyhold" would seem to be immaterial, as freehold is more valuable than copyhold ; but that Judge held that the description was not only material but essential, and that the burden lay on the vendor to prove that it was not essential to the purchaser. Tenure.

On the sale of land subject to a lease for twenty-one years, of which fifteen years only remained to run, the lease was described as a lease for seventeen years, and the vendor omitted to state that the lease was determinable at the end of seven or fourteen years. The purchaser complained of the misdescription, but as he failed to show any special reason for desiring the lease to continue for the full period, and was unable to prove that the property was less valuable on account of the lease being shorter than described, or being determinable, no relief was granted : *Goddard v. Jeffreys*, 1881, 51 L. J. Ch. 57. Lease.

On the other hand, the want of a few days at the end of a term of ninety-nine years—as in the case of a contract to sell a lease for ninety-nine years, the vendor having only an under-

lease for that term, less three days—is not necessarily too trivial a difference to be a ground for resisting specific performance. See *Darlington v. Hamilton*, 1854, Kay, 550; per Page-Wood, V.-C., commenting on *Madeley v. Booth*, 1848, 2 De G. & Sm. 718.

Where the vendor of a house described it as leased to A., and could only give the purchaser the benefit of a lease to Lord B., the purchaser, who could not show that Lord B. was a less desirable tenant than A., was held not entitled to relief for the misdescription: *Grissell v. Peto*, 1854, 2 Sm. & G. 39.

Arbitrary
fines.

On the sale of a manor it was stated in the particulars that the fines were arbitrary, whereas in fact some fines were certain. Amongst other reasons for refusing relief to the purchaser, it was said that the statement that the fines were arbitrary was not sufficient for the purchaser to form his resolution as to the value without further inquiry as to what the fines were, since an arbitrary fine is not necessarily greater than a fine certain: *White v. Cuddon*, 1842, 8 Cl. & F. at p. 786.

Rental.

On the sale of an under-lease the vendor described the improved rent to which the under-lease was subject as a “ground rent,” but also mentioned the true value of the rack rent. It was held that this description was, on the whole, not calculated to deceive, since the value of the property being given correctly, and the amount of the improved rent being also correctly stated, the application of the term “ground rent” to the improved rent was an immaterial misdescription: *Bartlett v. Salmon*, 1855, 6 D. M. & G. 33.

If nothing is added to correct the mistake, the description of rack rent as ground rent is material and (see p. 93) essential: *Stewart v. Alliston*, 1815, 1 Mer. 26.

Restrictive
covenants.

On the sale of a house standing on less than one-eighth of an acre, and in a residential neighbourhood, the omission to state a restrictive covenant against using the land as gasworks is an immaterial omission: *semble*, *Higgins and Hitchman*, 1882, 21 Ch. D. 95. This view is adopted by Cotton, L. J. (in *Ebsworth and Tidy*, 1889, 42 Ch. D. 23, 47), who, referring to that case, says that where it was practically impossible that gasworks should be erected, a covenant not to erect them might be disregarded. In *Ebsworth and Tidy* it was decided that on a sale

of an estate *pur autre vie* the omission to mention a covenant restraining the erection of a public house or of buildings costing less than a specified sum, was a material omission, although the land was built on and the house let for a term of twenty-one years determinable in three years' time; in such a case the purchaser might join with the remainderman in selling, or might sell under the Settled Land Act, and the covenant might make the property sell for less. The burden of showing that a restrictive covenant affecting the land does not do so substantially, rests on the vendor: per Fry, L. J., in *Ebsworth and Tidy*, 42 Ch. D. at p. 51.

If there are no minerals, the omission to mention that the vendor is not entitled to the minerals is immaterial: *Lyddal v. Weston*, 1739, 2 Atk. 19. If there are no minerals, the fact that the land is subject to rights of mining vested in other persons is also, it seems, immaterial: see *Martin v. Cotter*, 1846, 3 J. & L. 496, 509. Minerals.

The existence of a little dry-rot in the floor of a house situate in a clayey soil is an immaterial defect, a "mere bagatelle": *Bowles v. Atkinson*, Sug. 334. Dry-rot.

The vendor may prove that the purchaser was not influenced by the misdescription, or induced by it to buy what he would not have bought had he known the facts, or to give a higher price than he would otherwise have given. It is quite clear that if the purchaser would have given the same price in any event he cannot complain that he has suffered loss by reason of the misdescription. Purchaser not influenced.

The purchaser who alleges that he has been damnified by the misdescription must satisfy the Court that if he had known the facts he *would* not have bought: *Macleay v. Tait*, (1906) A. C. 24; and *Nash v. Calthorpe*, (1905) 2 Ch. 237 (cases under the Companies Act, 1867). In the latter case Romer, L. J., considered that it was sufficient for the purchaser to prove that if he had known he *might* not have bought; but this appears to be wrong. The purchaser must either prove that he would not have bought, or must prove a misrepresentation (or non-disclosure) of such a nature that the Court infers that no reasonable man would have bought. See, as to onus of proof, p. 72, above.

In *Whittemore v. Whittemore*, 1869, 8 Eq. 603, Malins, V.-C., gave the purchaser compensation for a deficiency in quantity, although he was "firmly persuaded that the purchaser would have given the same price for the property if those words" (the false description) "had been omitted." There was an affidavit by the purchaser that he would not have given so much if he had known the actual area. It is submitted that, in spite of the strong assertion quoted above, the Vice-Chancellor did believe this affidavit, or at all events thought that the vendor's proof to the contrary was insufficient. If not, it is submitted that compensation ought not to have been given to the purchaser.

Where the vendor represented himself as the agent of Lord G., the purchaser was forced to complete, although Lord G. had nothing to do with the sale; since the deceit practised by the vendor did not occasion any loss or inconvenience to the purchaser, nor induce him to enter into the contract: *Fellowes v. Gwydyr*, 1829, 1 Russ & My. 83.

An omission to disclose a notice to pave was treated as immaterial, and therefore not within a condition for compensation, on the ground that the value of the property was as much affected by liability to such a notice as by the fact that the notice had been actually served, and the purchaser's statement that he would not have purchased had he known was treated as immaterial to the question whether the omission was within the condition, although it might have entitled him to rescind or resist specific performance: *Leyland and Taylor*, (1900) 2 Ch. 625.

Motive for
rescinding.

If the misrepresentation was material (see p. 73), the purchaser's motive for resisting specific performance is not regarded as relevant to the question whether he did or did not rely on the misrepresentation: *Denny v. Hancock*, 1870, 6 Ch. 1; *Brooke v. Rounthwaite*, 1846, 5 Ha. 298, 303.

Thus, the fact that the purchaser's real reason for rescinding was want of money to complete is immaterial: *Aberaman Iron-works v. Wickens*, 1868, 4 Ch. 101, 108.

If the misrepresentation was one which would usually be regarded as immaterial, and the purchaser's own evidence is the sole proof that the misrepresentation complained of induced him

to enter into the contract, the purchaser's motive for resisting specific performance is relevant as affecting the value of such evidence : see judgment of James, L. J., in *Denny v. Hancock*, 1870, 6 Ch. 1.

But the purchaser's motive for purchasing may be material. Thus, where the purchaser was buying the vendor out in order to prevent his opposition to a private bill, and was indifferent whether the vendor had a good title or not, the purchaser was held unable to obtain relief for the false statement of the vendor's agent that the vendor had a good title : *Hume v. Pocock*, 1866, 1 Ch. 379. Motive for purchasing.

The principle that the misdescription must be one *dans locum contractui* applies also to actions of deceit—i.e. actions for damages for fraudulent misrepresentation. If a fraudulent misrepresentation is not believed in or relied upon, the person complaining of it will be unable to recover damages in an action of deceit. And if a statement, although untrue to the knowledge of the person making it, is so trivial that it could not, in the opinion of the Court, have influenced the conduct of the person complaining of it, it will not support an action of deceit : *Smith v. Chadwick*, 1884, 9 App. Ca. 187. Actions of deceit.

CHAPTER X

ESSENTIAL MISDESCRIPTION

Definition. AN “essential misdescription” is one whereby the purchaser was induced to purchase something which but for such misdescription he would never have purchased at all : *Flight v. Booth*, 1834, 1 Bing. N. C. at p. 377. A “non-essential misdescription” is one the only effect of which was to induce the purchaser to give a higher price than he would otherwise have given.

The word “essential” is preferable to the word “material,” because the latter word is needed to express the idea of a misdescription *dans locum contractui*. It is necessary to distinguish between a non-essential misdescription which influences the purchaser by inducing him to give a higher price, and an immaterial misdescription which does not influence the purchaser in any way ; see the preceding chapter.

In the absence of stipulation to the contrary, the purchaser will be entitled to rescind the contract and recover his deposit and expenses if there has been an essential misdescription, or if the title is defective in an essential point, although the vendor would prefer to complete, giving compensation : *Cato v. Thompson*, 1882, 9 Q. B. D. at p. 618. *A fortiori* in such a case the vendor’s action for specific performance, whether with or without compensation, will be dismissed ; since “a less serious misleading is sufficient to enable a purchaser to resist specific performance than is required to enable him to rescind” : per Lindley, L. J., in *Terry and White*, 1886, 32 Ch. D. 14. And, even if there is a condition that the purchaser shall complete with compensation for any defect, the purchaser can recover his deposit and expenses if the defect is essential : *Flight v. Booth*, 1834, 1 Bing. N. C. 370. But if the purchaser prefers, he can enforce specific

performance with compensation, even where the misdescription or defect is essential, if there is a condition for compensation which applies to the misdescription or defect, and if compensation is capable of being assessed : *Painter v. Newby*, 1853, 11 Ha. 26. See, further, as to conditions for compensation, pp. 279, &c.

If the misdescription or defect in title is non-essential, the vendor can enforce specific performance with compensation, even if there is no condition as to compensation : *Dyer v. Hargrave*, 1805, 10 Ves. 505.

The illustrations given below, pp. 81 to 94, show what is an essential misdescription. But the essentiality of a misdescription is not necessarily determined in the abstract. The Court has regard to the purchaser's desire at the date of the contract—*e.g.* his intention to use the land in a particular way; and to his position—*e.g.* as the owner of adjacent land. In *Magennis v. Fullon*, 1829, 2 Mol. 561, it is said, "There is now no case which is of authority deciding that in case of contract for a particular object, having in the eye of the purchaser a particular value from circumstances not capable of pecuniary compensation, the purchaser can be compelled to perform it if these be taken away." In the case of *Brooke v. Rounthwaite*, 1846, 5 Ha. 298, the Court took into consideration the fact that the purchaser was a timber merchant and had bought the estate for the sake of the timber trees. The purchaser can complain of a misdescription which is essential to him for a particular reason, although the vendor was not aware of any reason which would make the misdescription essential to the purchaser. The purchaser is not bound to inform the vendor beforehand of his motive in purchasing : *Knatchbull v. Grueber*, 1815, 1 Mad. at p. 168.

Where the misdescription is one which ordinarily would be treated as non-essential, the terms of the agreement may show that it is essential. Conversely, a matter ordinarily treated as essential may by the circumstances attending the contract be shown to be non-essential to the particular purchaser. Thus, the absence of any mention of tithes in the preliminary correspondence was held to show that the great tithes, which were expressly included in the formal contract, were not essential in the purchaser's eyes : *Smith v. Tolcher*, 1828, 4 Russ. 302.

Essentiality
not abstract.

Where only part of the land was described as tithe free, the fact that the purchaser had been willing to buy the rest of the land, knowing it to be subject to tithes, was considered sufficient to prove that freedom from tithes was not essential to him : *Binks v. Rokeby*, 1818, 2 Swa. 222. Where the purchaser, knowing that two acres in the middle of a park which he was buying were not the vendor's property, forcibly took possession of the land which he had bought, the Court held that those two acres were not essential to him : *Calcraft v. Roebuck*, 1790, 1 Ves. jun. 221.

Where a part of the property (to which the vendor cannot make out a good title) is obviously essential to the enjoyment of the rest, the purchaser is not precluded from saying that it is essential, merely because, at the time of the contract, he did not know of its essentiality : *Knatchbull v. Grueber*, 1815, 1 Mad. 153.

Where the purchaser insists at the hearing that a certain portion of the property is essential to the enjoyment of the remainder, the fact that after the purchase he put up this portion for sale might show that he did not consider it to be essential : but if the sale was designed for the purpose not of selling, but merely of ascertaining the value of that portion, he will not be precluded from saying that the portion was essential : *Knatchbull v. Grueber*, 1815, 1 Mad. 153.

Burden of
proof.

If the misdescription is obviously essential, the burden of proof lies on the vendor to show that it was not essential to the purchaser. If it is not one which is obviously essential, the burden lies on the purchaser to prove the special circumstances which made it essential to him. This seems to be the principle deducible from the cases cited below, and also from the cases on the proof of the materiality of a misdescription : see above, pp. 72-76.

Purchaser
buying in
name of
agent.

If the purchaser has employed an agent to purchase, and such agent has bought in his own name, the agent or nominal purchaser may take any objection which the principal or real purchaser could have taken if he had been the nominal as well as real purchaser. For instance, he may show that a deficiency of a portion of the property sold is "essential," on the ground of its position with regard to the real purchaser's other property : *Re Arnold*, 1880, 14 Ch. D. 270.

Sometimes the Court directs an inquiry whether the deficiency Inquiry.
is material or not. This was done in *Evance v. Hogg*, Reg. Lib. 1805, A. 440; (see Seton, p. 2258); *McQueen v. Farquhar*, 1805, 11 Ves. 467; (see Pemberton on Judgments, p. 616); *Stewart v. Conyngham*, 1851, 1 Ir. Ch. R. 534: see, too, per Lord Hatherley in *Richardson v. Smith*, 1870, 5 Ch. at p. 652.

More frequently the Court decides the essentiality of the deficiency or misdescription at the hearing.

The cases illustrating what are and what are not essential Illustrations
misdescriptions may be conveniently classified according as the of essentiality.
misdescription affects—

1. The identity of the property.
2. The tenure, *quantum* of vendor's estate, or nature of vendor's interest.
3. The size or extent.
4. The situation and physical conditions.
5. The incumbrances, contingencies, and liabilities affecting the property.
6. The rent or profits produced by it.

There will be found below, in addition to cases in which the purchaser has succeeded in rescinding and recovering his deposit and expenses, cases in which the vendor has brought an action for specific performance with compensation and failed on the ground of the essentiality of the misdescription. The former cases will be distinguished by the addition of the words "deposit recovered."

1. Identity

A misdescription affecting the identity of the property is Identity.
essential. Where a house numbered 2 was described as "No. 4," the misdescription was held to be essential, although No. 2 was the same sort of house as No. 4 and in better repair: *Leach v. Mullett*, 1827, 3 Car. & P. 115 (deposit recovered).

2. Tenure, &c.

Misdescriptions affecting the tenure, the *quantum* of the Tenure.
vendor's estate, or the nature of the vendor's interest, are, as a general rule, essential.

- Leasehold.** Thus, where leasehold is sold as freehold (however long the term may be (*e.g.* a mortgage term for 4,000 years which had been foreclosed), the misdescription is essential: *Drewe v. Corpe*, 1804, 9 Ves. 368.
- Copyhold.** Where the vendor's land is of copyhold tenure and he has described it as freehold, the misdescription is essential: *Hart v. Swaine*, 1877, 7 Ch. D. 42, where, after completion, the purchaser recovered the whole of the purchase money and his expenses. See, too, *Turner v. West Bromwich Union*, 1861, 3 L. T. 662. Similarly, if without mentioning the tenure he has by agreeing to "grant and convey" implied that it is freehold (*Hick v. Phillips*, 1721, Prec. in Ch. 575), or has offered it for sale without mentioning the tenure, inasmuch as an agreement to sell land *simpliciter* implies that the land is freehold.
- Nominal fines.** If, however, the fines, reliefs, and heriots are fixed and nominal, and the right to the minerals and timber is in the tenant, the misdescription is non-essential: *Price v. Macaulay*, 1852, 2 D. M. & G. 339, 344.
- Enfranchised copyhold.** Where land formerly copyhold, but enfranchised under the Copyhold Enfranchisement Acts, the right to the minerals being reserved to the lord, is described simply as "freehold," the misdescription is essential: *Upperton v. Nickolson*, 1871, 6 Ch. 436 (deposit recovered).
- Freehold called "copyhold."** Where freehold property was described as "copyhold, equal in value to freehold," the error was considered non-essential: *Twining v. Morrice*, 1788, 2 Bro. C. C. at p. 331. In the case of *Ayles v. Cox*, 1852, 16 Beav. 23, the description of freehold land as "copyhold" was considered as essential; but this decision appears doubtful, as it is opposed to *Twining v. Morrice*, and seems wrong on principle, unless it were shown that the purchaser had some special motive for preferring copyhold to freehold. In itself freehold is necessarily at least as valuable as copyhold, if not more valuable, and the purchaser could not have been induced by the misdescription to give more than he would have given, or to purchase property which he would not have purchased, had there been no misdescription; so that, so far from being entitled to rescind, it would appear that he was not even entitled to compensation. If the description had led

the purchaser to think that he was purchasing some other piece of land, then the misdescription would have been essential, as it would have misled him as to the identity.

The description of an under-lease as a "lease" was treated as essential in *Madeley v. Booth*, 1848, 2 De G. & S. 718 (deposit returned by consent), and *Beyfus and Masters*, 1888, 39 Ch. D. 110 (deposit and expenses recovered). In *Darlington v. Hamilton*, 1854, Kay, pp. 557, 558, Page-Wood, V.-C., doubted whether the purchaser could resist specific performance "simply upon the ground of there being another lease for years interposed between him and the freehold." And the decision in *Madeley v. Booth* was disapproved of by Jessel, M. R., in *Camberwell, &c. v. Holloway*, 1879, 13 Ch. D. at p. 760; but previous remarks in the same judgment are inconsistent with this disapproval. And Bowen, L. J., in *Beyfus and Masters*, 1888, 39 Ch. D. at p. 115, disapproves of Jessel, M. R.'s criticism. The reason given by Fry, L. J. (*ibid.* p. 116), is the true reason: the outstanding term makes it impossible for the tenant to surrender the lease to the freeholder and take a new lease.

Under-lease.

Where the property described as "held under a lease," or as "the remainder of a lease," is held under a derivative lease—*i.e.* where the original lease comprises other property as well as the property comprised in the under-lease, the whole being subject to general covenants and a power for re-entry for the breach of any of them—the misdescription is essential: *Darlington v. Hamilton*, 1854, Kay, 550. Similarly, on a contract to grant a lease: *Fildes v. Hooker*, 1818, 3 Mad. 193.

Derivative lease.

The Conveyancing Act, 1881, s. 14, which gives the lessee the opportunity of making good the breach, does not affect the point, because the purchaser of a derivative lease has no power to compel the lessee or sub-lessee of the rest of the property comprised in the original lease to avail himself of the opportunity afforded him by that section: *Cresswell v. Davidson*, 1887, 56 L. T. 811.

On the sale of an agreement for a lease, if the vendor has only a voidable agreement the defect is essential: *Brewer v. Broadwood*, 1882, 22 Ch. D. 105 (deposit recovered).

Voidable lease.

On an agreement to grant a lease, if the lessor can only give an equitable lease, this is an essential defect: per Leach, M. R.,

Equitable lease.

in *Hanbury v. Litchfield*, 1835, 2 My. & K. 629. There, however, an agreement to grant a lease for thirty-one years was enforced with compensation, although the lessor could grant a legal lease for twenty-one years only, with a covenant to grant a further lease for ten years, there being special circumstances, owing to the expense which the lessee had incurred in building, and which he sought to recover, by praying for a declaration that he was entitled to a mortgage for the amount, and that the property should be sold to repay him : Reg. Lib. 1833, A. 1389.

Where land was described as "in the joint occupation of A. and B. as lessees," the fact being that C. was the lessee, A. an assignee from him, and A. and B. in occupation, but not in occupation as lessees, the misdescription was treated as essential : *Ridgway v. Gray*, 1849, 1 Mac. & G. 109.

The description of a perpetual rent-charge as "freehold, subject to a perpetual rent-charge," is an essential misdescription : *Prendergast v. Eyre*, 1828, 2 Hogan. 81. Where a sum in gross paid for the user of land as a pleasure ground, and secured by a personal covenant, was put up for sale under the description "freehold ground rent," the error was treated as essential : *Robins v. Evans*, 1863, 2 H. & C. 410 (deposit recovered).

The description "redeemed land tax, amounting to 3*l.* 14*s.*, charged on three houses," the fact being that there were separate sums of 1*l.* 12*s.*, 1*l.* 1*s.*, and 1*l.* 1*s.* charged on the separate houses, is an essential misdescription, and one for which compensation cannot be assessed : *Cox v. Coventon*, 1862, 31 Beav. 378.

It is a non-essential misdescription to describe a right of common for sheep as a "right of common" simply : *Howland v. Norris*, 1784, 1 Cox, 59.

The following defects have been held to be essential :

Reversion.

When the vendor's interest instead of being an estate in possession is a reversion expectant on a lease for a life or lives : *Collier v. Jenkins*, 1831, You. 295 ; *Linehan v. Cotter*, 1844, 7 Ir. Eq. R. 176 ;

Life estate.

Or is a life estate instead of the fee : *Ex parte Riches*, 1883, 27 Sol. J. 313 ;

Or a life estate with remainder in fee, subject to an intervening estate tail : Sug. 308.

On the sale of a leasehold interest, a trifling deficiency in the length of the term is non-essential. The following decisions and *dicta* illustrate what is regarded by the Courts as a trifling deficiency.

A deficiency of two years out of ninety-nine : per Lord Erskine in *Halsey v. Grant*, 1806, 13 Ves. at p. 77.

A deficiency of three months out of twenty-one years : per Lord Eldon in *Mortlock v. Buller*, 1804, 10 Ves. at p. 305.

On the other hand, a deficiency of nine months out of twenty-one years was held to justify the purchaser in rescinding : *Forrer v. Nash*, 1865 (according to the report in 35 Beav. 167 ; the point is not mentioned in the report of the same case in 14 W. R. 8 and 11 Jur. N. S. 789). But it does not appear that the vendor was willing to give compensation.

If the vendor has contracted to sell the entirety, but has only undivided parts of the estate, the defect is essential : *Dalby v. Pullen*, 1829, 3 Sim. 29 ; affirmed, 1 Russ. & M. 296. (See below, p. 86.)

3. *Size or Extent*

The misdescription or defect in title may affect the size or extent of the property ; that is, the acreage may be less than is stated in the particulars, or the vendor may have no title to part of the property, or some part—*e.g.* a house—may not be in existence, or the title deeds may show a title to fewer acres than the vendor has contracted to sell. The misdescription will be treated as essential (*a*) if the deficiency is large in proportion to the whole quantity contracted to be sold ; or (*b*) if the part which is wanting is necessary to the enjoyment of the residue, or possesses some special value in the purchaser's eyes ; or (*c*) would, if possessed by another, be liable to affect the purchaser's enjoyment of the residue.

(*a*) A deficiency of $4\frac{1}{2}$ out of 30 acres was treated as essential in *Shackleton v. Sutcliffe*, 1847, 1 De G. & Sm. 609. A deficiency of 430 acres out of 1,530 was treated as essential in *Aberaman Ironworks v. Wickens*, 1868, 4 Ch. 101 (purchaser recovered his purchase money). A deficiency of 11 out of 70 acres would probably be essential : per Lord Eldon in

Length of term.

Undivided part.

Quantity.

(*a*) Large deficiency.

Osbaldiston v. Askew, 1821, 2 Jac. & W. 539. But the following were treated as non-essential :

A deficiency of 2 out of 186 acres : *Calcraft v. Roebuck*, 1790, 1 Ves. jun. 221.

A deficiency of 6 acres out of an estate which was sold for 14,000*l.* : *McQueen v. Farquhar*, 1805, 11 Ves. 467 (but nothing was said about compensation in the judgment).

A deficiency of 26 out of 217 acres : *Hill v. Buckley*, 1811, 17 Ves. 394.

A deficiency of 339 out of 1,372 square yards : *Fawcett and Holmes*, 1889, 42 Ch. D. 150 (the property there consisted of house, yard, and buildings—well-defined and fenced off).

Where there was said to be 14 acres of “ meadow,” and 2 were not meadow : *Scott v. Hanson*, 1826, 1 Sim. 13.

Where the property was described as containing 46 feet in depth, but really contained only 33 : *King v. Wilson*, 1843, 6 Beav. 124 (but there the purchaser was tenant in possession, and either knew the depth, or did not care what the depth was).

Undivided
share.

As a rule, if the deficiency consists not of the acreage being less, but of there being no title to an undivided share of the property, the deficiency, unless very minute, would be essential.

Where, having contracted to sell two-sevenths of an estate, the vendor could only show a title to one-seventh, the defect was held essential : *Roffey v. Shallcross*, 1819, 4 Mad. 227.

Similarly, where, having contracted to sell the entirety, the vendor could only show a title to six-sevenths : *Dalby v. Pullen*, 1829, 3 Sim. 29 ; affirmed, 1 Russ. & My. 296.

(b) Essential
portion.

(b) If the part which is wanting is necessary to the enjoyment of the residue the defect is essential.

In *Evance v. Hogg* (Seton, p. 2258) an inquiry was directed “ whether such part (if any) of the said estate to which the plaintiff cannot make a good title be material to the enjoyment of the remainder.” In *Robinson v. Musgrove*, 1838, 2 Moo. & R. 92, it was said : “ Deficiency in the value may be fit matter of compensation, but not the total absence of one of the things sold.”

In the following cases the part wanting was held to be necessary to the enjoyment of the residue :

Coach house and stable, on sale of a "freehold house and Stable. garden with a coach house and stable": *Turner v. Turner*, 1881, W. N. 70.

On the sale of a leasehold house and yard, the fact that the Yard. yard was not comprised in the lease, but held from year to year, at a separate rent, was held to be an essential defect: *Dobell v. Hutchinson*, 1835, 3 Ad. & E. 355 (deposit recovered).

On the sale of a wharf and jetty, where the vendor had no Jetty. title to the jetty: *Peers v. Lambert*, 1844, 7 Beav. 546. In *Drewe v. Hanson*, 1802, 6 Ves. at p. 678, Lord Eldon disapproved of an earlier case where, on a contract for a house and wharf, the vendor having no title to the wharf, the purchaser was held bound to take the house without the wharf: see also his remarks in *Seton v. Slade*, 1802, 7 Ves. 270; and *Halsey v. Grant*, 1806, 13 Ves. 73.

On the sale of a house and four acres, the fact that the vendor Frontage. had no title to a strip of land forming the frontage to the highway was held an essential defect: *Perkins v. Ede*, 1852, 16 Beav. 193.

In *Re Arnold*, 1880, 14 Ch. Div. 270, where a farm of forty-two acres was offered for sale, the plan showing one of the parcels as a narrow close having a long frontage to a high road, and one part of the particulars describing it as seven and another as four acres, the facts being that the close contained seven acres, but the vendors were only entitled to four undivided one-sevenths, the purchaser was held not bound to accept an arrangement which the vendors made with the owner of the other three-sevenths to give him four acres out of another close, parcel of the same farm, and also abutting on a road, in exchange for his three-sevenths, nor bound to complete with compensation.

Even a small deficiency is essential if it makes the property useless for the purpose for which the purchaser bought, as where a wharf, described as sixty feet long, is only fifty feet long, and useless except for small barges: *Deptford Creek Bridge Co. and Beavan*, 1884, 28 Sol. J. 327.

On a sale in lots, a purchaser who buys two lots may, if he is Sale in lots. entitled to rescind as to one lot, rescind as to both lots if the

lot as to which he is entitled to rescind is necessary to the enjoyment of the other lot (see *Poole v. Shergold*, 1786, 1 Cox, 273; and *Ex parte Tilsley*, 1819, mentioned in 4 Mad. 227, note); or would render the other lot more valuable: *Dykes v. Blake*, 1838, 4 Bing. N. C. 463 (deposit recovered). If the memorandum constitutes a contract for a sale of both lots for one aggregate sum, the purchaser is entitled to rescind the whole contract in such a case: *Ibid.*

(c) Residue
liable to be
injured.

(c) If the part which is wanting would, if possessed by a third person, be liable to affect the purchaser's enjoyment of the residue, the defect is essential.

The liability just mentioned must be probable; a mere distant, fanciful, or conjectural liability would not be sufficient: *Knatchbull v. Grueber*, 1815, 1 Mad. 153.

In that case, a mansion and 700 acres were sold, and the vendor had no title to twelve acres, which were opposite the park gates, and contained brick earth, so that it was probable that they would be built on; this was considered such a defect as entitled the purchaser to rescind.

4. *Physical Condition*

The misdescription or defect in title may be in a matter relating to the situation of the property or some other physical condition: *e.g.* its state of repair.

Situation.

A house near Pall Mall was described as "on the north side of Pall Mall opposite Marlborough House." The misdescription was considered essential: *Stanton v. Tattersall*, 1853, 1 Sm. & Gif. 529. Similarly, where the distance from a town was three times as great as represented by the vendor: *Norfolk v. Worthy*, 1808, 1 Camp. 337 (deposit recovered).

County.

Where an estate on the Essex side of the river, but really in Kent, was described as being in Essex, the purchaser was compelled to complete, although his object was to become a freeholder of Essex: *Shirley v. Davis*, 1802, cited but disapproved of by Lord Eldon in *Drewe v. Hanson*, 1802, 6 Ves. 678; and see note in *Shirley v. Stratton*, 1785, 1 Br. C. C. 440.

The description of land which is uncultivated as "land in Cultivation. a high state of cultivation," is a non-essential error : *Dyer v. Hargrave*, 1805, 10 Ves. 505.

The description "within a ring fence," when the fields are Ring fence. scattered, is an essential misdescription : *Ibid.*

The description "brick-built," in the case of a house which "Brick-built." was partly of brick, partly of timber, and partly of lath and plaster, was held to be essential : *Powell v. Double*, Sug. 29.

Misdescription as to the state of repair of a house is non-Repairs. essential unless the house is wanted for immediate residence : *Dyer v. Hargrave*, 1805, 10 Ves. 505. The decision to the contrary in *Loyes v. Rutherford*, Sug. 331, would probably not be followed. In *Grant v. Munt*, 1815, G. Coop. 173, dry-rot was treated as a non-essential defect, and compensation was awarded.

Where the only means of access to a house was a passage through another house, and the passage was not reasonably secure and commodious, the defect was held to be essential : *Stanton v. Tattersall*, 1853, 1 Sm. & G. 529 (deposit recovered).

Water supply is an essential matter in the case of a dwelling Water supply. house : *Bird v. Andrew*, 1887, 4 Times L. R. 31 ; *Evershed and Campion* (stated above, p. 5).

Ornamental timber is an essential matter in the case of the Timber. purchase of a residential estate : *Magennis v. Fallon*, 1829, 2 Mol. at p. 590. Ordinary timber is, in the absence of any special intention on the purchaser's part, a non-essential matter : *Ibid.* In *Stewart v. Conyngham*, 1851, 1 Ir. Ch. R. 534, it was referred to the Master to inquire whether the right to the timber (being ordinary timber) on a small portion of the estate was material. If the purchaser is a timber merchant, buying for the sake of cutting the timber, the absence of even ordinary timber would be an essential matter : *Brooke v. Rounthwaite*, 1846, 5 Ha. 298. In ascertaining whether the timber is ornamental, the Court is not restricted by the definition ("timber planted and growing or standing for ornament") given in the case of an action against tenant for life without impeachment : *Magennis v. Fallon*, 1829, 2 Mol. at p. 588. And the Court will not go into the *quantum* of despoliation of ornament ; the destruction of one

beautiful tree would be sufficient. The question is, Does it admit of pecuniary compensation? *Ibid.* p. 590.

Frontage.

A misdescription as to the extent of frontage, especially if the purchaser has bought with the intention of building, is essential. In *Brewer v. Brown*, 1884, 28 Ch. D. 309, the description was "enclosed by a wall, with tradesman's entrance"; the wall which abutted on a road did not belong to the vendor, and the entrance was only used on sufferance. The purchaser had intended to build cottages on the property fronting the road. The misdescription was held to be essential, and the purchaser recovered his deposit.

5. *Incumbrances, Contingencies, and Liabilities affecting the Property*

Tithes.

Where land is sold "tithe free," the liability to tithe or tithe rent-charge is, in the absence of special circumstances, an essential matter. The rule is now established "that a man who agrees to purchase a landed estate, which is described to be tithe free, shall not be compelled to complete his purchase if it turns out that the land is subject to tithe": per Leach, M. R., in *Smith v. Tolcher*, 1828, 4 Russ. at p. 305. The cases of *Lowndes v. Lane*, 1789, 2 Cox, 363, and *Howland v. Norris*, 1784, 1 Cox, 59, deciding the contrary, are no longer binding authorities. The latter case was disapproved of by Lord Eldon in *Drewe v. Hanson*, 1802, 6 Ves. 678, and *Seton v. Slade*, 1802, 7 Ves. 270, and by Lord Erskine in *Halsey v. Grant*, 1806, 13 Ves. 78. If the matter were still open for discussion, it might very well be argued that the existence of a tithe rent-charge is not in itself an essential defect, and that the onus of proving its essentiality in the purchaser's mind should lie on the purchaser. As the matter stands at present, the misdescription is treated as essential, unless the vendor can show from the circumstances of the contract that it was not essential to the mind of the purchaser. In *Binks v. Rokeby*, 1818, 2 Swa. 222, where only one-fourth of the estate was described as tithe free, the purchaser was forced to complete with compensation, because he was considered to be precluded from arguing that freedom from tithe was an essential point, since he was at the

same time purchasing land which he knew was not tithe free. In *Smith v. Tolcher*, 1828, 4 Russ. 302, liability to great tithes was held to be non-essential under the following circumstances : The estate consisted of a mansion house and seven acres of pasture, and it was very improbable that any great tithes would arise, and the "great tithes," though inserted in the formal agreement, were not mentioned in the preliminary correspondence.

The general rule as to incumbrances is, that where there is an irremovable incumbrance, which is large compared with the value of the property—*e.g.* an incumbrance amounting to half the purchase money—the purchaser cannot be compelled to complete. See per Lord Eldon, in *Wood v. Bernal*, 1812, 19 Ves. at p. 221.

Incumbrances.

Thus, a large rent-charge, viz. 600*l.*, was treated as an essential defect in *Portman v. Mill*, 1826, 1 Russ. & M. 696. But small rent-charges are non-essential : per Leach, V.-C., in *Esdaile v. Stephenson*, 1822, 1 S. & St. 122. In *Halsey v. Grant*, 1806, 13 Ves. 73, a rent-charge of 19*l.* 6*s.*, and other small charges, were considered non-essential, as it appeared that other property, not the subject of the sale, was also subject to and amply sufficient to bear those charges, and would probably be first resorted to. In *Pope v. Garland*, 1841, 10 L. J. Ex. Eq. at p. 16, Alderson, B., said that if the ground rent was more than the vendor had stated, it would only be a subject for compensation.

Rent-charges.

A distinction has been drawn between quit-rents and rent-charges. Leach, V.-C., in *Esdaile v. Stephenson*, 1822, 1 S. & St. 122, says : "It is now settled that quit-rents are subjects of compensation, probably because they are incidents of tenure." The reason may perhaps be that quit-rents are invariably small, and therefore come within the rule stated above.

Quit-rents.

The absence of title to the minerals is an essential defect : *Upperton v. Nickolson*, 1871, 6 Ch. 436 (deposit recovered). If, however, there are no minerals, the defect so far from being essential is not even material : *Lyddal v. Weston*, 1739, 2 Atk. 19 ; *Martyn v. Cotter*, 1846, 3 J. & L. at p. 509.

Minerals.

The fact that the property is subject to rights of common is an essential defect : see *Gibson v. Spurrier*, 1795, Peake, Add. Cas. 49 ; *Vancouver v. Bliss*, 1805, 11 Ves. 458.

Rights of common.

Easements. The existence of a right of way over the land is an essential matter, especially if the land is sold as building land : *Dykes v. Blake*, 1838, 4 Bing. N. C. 463 (deposit recovered). An underground watercourse, which third parties had liberty to open, cleanse, and repair, making compensation for any damage thereby occasioned, is an essential defect if the land is sold as building land : *Shackleton v. Sutcliffe*, 1847, 1 De G. & S. 609. A public sewer vested in the local authority is a defect admitting of compensation : *Brewer and Hankin*, 1899, 80 L. T. 127 (where the land was not sold as building land). An easement for the owner of an adjoining house to use the kitchen of the house sold would be regarded as essential : *Heywood v. Mallalieu*, 1883, 25 Ch. D. 357 (deposit returned).

Sporting rights. The fact that the land is subject to a right of sporting would probably be treated as an essential defect : *Burnell v. Brown*, 1867, 1 Jac. & W. at p. 172.

Restrictive covenants. Restrictive covenants—*e.g.* a covenant against using a house as a shop—are essential defects : *Cato v. Thompson*, 1882, 9 Q. B. D. 616 ; *Flight v. Booth*, 1834, 1 Bing. N. C. 370 (deposit recovered in both cases).

A covenant against building any erection of different height or dimensions from those subsisting at a given date is an essential defect : *Cox and Neve*, (1891) 2 Ch. 109 (deposit recovered).

On the sale of leasehold property, a non-disclosed covenant contained in the lease to build thirty-four additional houses, to keep in repair the houses built and to be built, and to deliver them up at the end of the term, was held to be an essential defect : *Nouaille v. Flight*, 1844, 7 Beav. 521.

If the character of the property is such that the Court would regard the restrictive covenants as immaterial—*e.g.* a covenant against using the land as gasworks, in the case of a house standing on less than one-eighth of an acre and in a residential neighbourhood, the restrictive covenants would *a fortiori* be considered non-essential, unless the purchaser could show some reason for their being essential in his case : see *Higgins and Hitchman*, 1882, 21 Ch. D. 95.

The liability to keep up fences, watercourses, &c., on the land sold is an essential defect : *Larkin v. Rosse*, 1846, 10 Ir. Eq. 70.

On the sale of a reversion expectant on the death of A. without children, a misrepresentation of A.'s age is essential : *Sherwood v. Robins*, 1828, Moo. & Mal. 194 (deposit recovered). There A., a man aged sixty-four years, was described as aged sixty-six. Probably if A.'s actual age had been such as to reduce the contingency of the birth of children to an impossibility, as, for instance, if A. were a *woman* aged sixty-four, or even only sixty, the misstatement of A.'s age might be made a subject of compensation, and in that case would not be treated as essential. Reversion.

6. Rents or Profits

A misdescription of rental or annual profits, &c., is generally treated as non-essential, and admitting of compensation. Profits.

In *Cuthbert v. Baker*, Reg. Lib. A. 1790, fol. 442 (Sug. 313), the statement that the quit-rents of a manor amounted to 2*l.* a year, when they were in reality only 1*l.* 10*s.* a year, was held to be non-essential.

An over-statement of the profits of a colliery was treated as non-essential in *Powell v. Elliot*, 1875, 10 Ch. 424 ; but the description of rack rent as "ground rent" was held to be essential in *Stewart v. Alliston*, 1815, 1 Mer. 26.

And where the misdescription is not as to the amount of rent, but of the fact of the tenancy, it is more likely to be treated as essential. Thus where the property was described as "at present in the occupation of C. at a rental of 42*l.*," the fact being that C. was in occupation adversely to the vendors, and that possession could only be recovered from her by ejectment, it was held that the misdescription was essential : *Lachlan v. Reynolds*, 1853, Kay, 52 (deposit recovered).

And where a farm was described as "lately in the occupation of H. at an annual rental of 290*l.*," the fact being that H. had occupied for one quarter for 1*l.*, and then for one year only for 290*l.*, the misleading statement was treated as essential and the purchaser discharged, notwithstanding a condition for compensation : *Dimmock v. Hallett*, 1866, 2 Ch. 21.

Where the misdescription, defect in title, incumbrance or liability affects not the whole estate sold, but only a portion, Misdescription affecting portion only.

the essentiality of the misdescription, &c., depends on two questions: (1) is the defect an essential one as regards that portion? (2) if so, is that portion essential as regards the enjoyment of the whole property? The answer to the first question would probably be found in one of the decisions recorded under the headings 2, 4, 5, and 6, above; that to the second under heading 3.

On the sale of 30 acres, it turned out that $4\frac{1}{2}$ acres were subject to an undisclosed easement—viz. an underground water-course, which third parties had the right of opening and repairing. As the land was sold as “building land,” the easement was an essential defect as regarded the $4\frac{1}{2}$ acres, and the consequent deficiency of these $4\frac{1}{2}$ acres was considered to be essential to the whole property: *Shackleton v. Sutcliffe*, 1847, 1 De G. & Sm. 609.

CHAPTER XI

VENDOR COMPELLED TO MAKE GOOD HIS REPRESENTATION

THE purchaser can, if he asks for relief before the conveyance is executed, compel the vendor to make good any errors or representations contained in the written contract, if it be possible for the vendor to do so, except in the cases mentioned below, of hardship, &c. The purchaser cannot compel the vendor to make good errors or representations contained in a parol statement not incorporated in the written contract, unless the vendor himself seeks to enforce the contract.

Representa-
tion to be
made good.

Thus, if there is an undisclosed mortgage on the property, the purchaser is entitled to have the property conveyed to him and to have the purchase money applied in paying off the mortgage. But if the undisclosed mortgage exceeds the purchase money, the purchaser who insists on specific performance cannot claim, in addition to a gratuitous conveyance, payment to himself of such excess. See *Wedgwood v. Adams*, 1844, 8 Beav. 103.

Mortgages.

A. and B. sold property as tenants in common for 200*l.*, describing it as subject to a mortgage for 400*l.* A., it was afterwards discovered, had no title, and B.'s moiety was subject to the whole mortgage. B. was compelled to convey his moiety without receiving any purchase money, but he was not compelled to pay the purchaser the difference between the half of the purchase money—*i.e.* 100*l.*—and the half of the mortgage money—*i.e.* 200*l.*—which the purchaser had not expected to fall on B.'s moiety. The purchaser was compelled to covenant to keep down the interest on the mortgage and to indemnify B.: *Horrocks v. Rigby*, 1878, 9 Ch. D. 180.

The Conveyancing Act, 1881, s. 5, enabling the Court to provide for keeping down incumbrances by directing payment

Conv. Act,
1881, s. 5.

into Court of a sum to be invested in Government securities, will probably not be enforced in sales out of Court on the application of the purchaser, if this would inflict a hardship on the vendor. See *Great Northern Railway and Sanderson*, 1884, 25 Ch. D. 788, where property sold for 868*l.* "free from incumbrances" was subject to a rent-charge of 63*l.*, to discharge which would have required a sum far exceeding the purchase money. It is doubtful whether this section applies at all to a rent-charge secured on the land by Act of Parliament where the persons entitled to the rent-charge do not consent : *Ibid.*

On a sale by the Court of land charged with legacies, as it was impossible to obtain releases from the legatees, an order was made under this section : *Archdale v. Anderson*, 1888, 21 L. R. Ir. 527.

The Court has jurisdiction under this section notwithstanding that, in order to ascertain the amount necessary to be paid into Court, questions involving the construction of a will have to be decided, and that future interests may be affected : *Freme's Contract*, (1895) 2 Ch. 256.

Disentailing.

The Court will decree specific performance of a contract by a tenant in tail to execute a disentailing assurance, notwithstanding sect. 47 of the Fines and Recoveries Act : *Bankes v. Small*, 1887, 36 Ch. D. 716. So, too, before the Fines and Recoveries Act, a tenant in tail in remainder who had contracted to sell an advowson to the incumbent, and had thereby induced the incumbent to build a better house than he would have done, was compelled to create a base fee and convey it to the purchaser, and to covenant to suffer a recovery on the death of the life tenant : *Bolingbroke's case*, c. 1785, 1 Sch. & Lef. 19 n., quoted in 2 Ph. at p. 605.

Statutory
duty conflict-
ing with sale.

Trustees of a turnpike road which, under the General Turnpike Act, 3 Geo. IV. c. 126, s. 39, was liable to pre-emption by the adjoining owner, were not allowed to allege their neglect to offer the land to such owner as a reason for refusing to convey it to a purchaser pressing for specific performance, although it was in evidence that the adjoining owner insisted on his rights : *Barrett v. Ring*, 1854, 2 Sm. & G. 43. It did not appear that the adjoining owner's rights would be prejudiced in any way by the

sale, and the purchaser was content to take such interest as the vendors had, and did not ask for compensation ; moreover the purchaser had laid out money on the property.

The vendor will not be compelled to make good the error if this would necessitate a breach of trust : see below, p. 105. Breach of trust.

Specific performance will not be decreed if the result would be to compel the vendor to commit a breach of a prior agreement with a third person. Thus, specific performance was not decreed of a contract to sell a leasehold interest, where the lease contained a covenant not to assign without the lessor's written consent and the lessor refused his consent : *Willmott v. Barber*, 1880, 15 Ch. D. 96.

In *Re Chifferiel*, 1888, 40 Ch. D. 45, the Court refused to make the vendor pay the purchaser, by way of compensation, the expense of completing an incomplete road which the vendor had described as "made up." Compensation was, however, decreed. See below, p. 122, as to its assessment. Roads.

It does not appear that the purchaser asked the Court to compel the vendor to make good his description, but rather that he claimed compensation, and if he had received the money would not have expended it on completing the road. It is submitted that the purchaser could have compelled the vendor to complete the road.

The Court will not compel the vendor to purchase and convey the tithes when he has contracted to sell an estate as "tithe free" : *Todd v. Gee*, 1810, 17 Ves. 273. Tithes.

If the amount of undisclosed incumbrances on the property exceeds the purchase money, the purchaser will not be entitled to compel the vendor to remove them : *Wedgwood v. Adams*, 1844, 8 Beav. 103 (where the vendors were trustees for sale). Hardship.

If trustee-vendors, ignorant of the amount of incumbrances upon the property, personally undertake to clear off all incumbrances, the Court will not compel them to carry out their undertaking : *Ibid.*

In addition to the cases of hardship mentioned above, the Court refused on the ground of hardship to enforce the contract against the vendor in the following instances :

Forfeiture.

Where the vendor undertook to make a road over other property, but it was found that he could not do so without incurring the risk of a forfeiture of part of his property, which he held under a lease containing restrictive covenants: *Peacock v. Penson*, 1848, 11 Beav. 355. There, the vendor was ordered to complete, giving compensation.

Where the vendor discovered that he could not sell without forfeiting, under his father's will, half the purchase money to his brother: *Faine v. Brown*, 1750, cited in argument 2 Ves. sen. 307.

CHAPTER XII

COMPENSATION

1. When compensation will be decreed	PAGE 99
2. Method of assessing compensation	107

THE construction and effect of conditions allowing or refusing compensation are considered below at pp. 279 to 299. The present chapter deals with the general law in the absence of stipulation.

1. WHEN COMPENSATION WILL BE DECREED

(i) *Compensation (or abatement) at Vendor's desire*

In the absence of stipulation the Court will, at the desire of the vendor, decree partial performance with compensation if the misdescription or defect is non-essential (and if compensation can be fairly assessed), although the purchaser would prefer to abandon the contract : *Dyer v. Hargrave*, 1805, 10 Ves. at p. 507. See above, p. 78, as to what misdescriptions or defects are essential.

Compensation at vendor's desire.

The words "if compensation can be fairly assessed" are perhaps superfluous, since the impossibility of assessing compensation would, of itself, prove that the misdescription is an "essential" one. See below, p. 107, as to the possibility of assessing compensation.

(ii) *Compensation at Purchaser's desire*

Except in cases of hardship to the vendor, and other cases mentioned below, the Court will, in the absence of stipulation, decree partial performance with compensation at the desire of the purchaser, although the misdescription was one which would usually be regarded as essential, and even though the vendor

Compensation at purchaser's desire.

would prefer to abandon the contract; provided that the misdescription was contained in the written contract, and that compensation can be assessed. If the misdescription was only verbal, or if compensation cannot be assessed, the purchaser cannot obtain specific performance with compensation. Moreover, in the case of a defect in title which is as much within the purchaser's knowledge as within the vendor's, as on a sale by one partner to another, the purchaser cannot obtain compensation for the defect : *Hopcraft v. Hopcraft*, 1897, 76 L. T. 341.

Owner of
moiety.

If the vendor is entitled only to an undivided moiety of the property, the entirety of which he contracts to sell, the purchaser may compel him to convey his moiety on payment of half the purchase money : *Hooper v. Smart*, 1874, 18 Eq. 683. Similarly, a contract to grant a lease of a house by a person who was entitled only to an undivided moiety was enforced to the extent of that moiety, with an abatement of the rent : *Burrow v. Scammell*, 1881, 19 Ch. D. 175. But a contract to grant a lease of a colliery ought not to be specifically enforced if the lessor has only an undivided moiety : *Price v. Griffith*, 1851, 1 D. M. & G. 80. A contract to grant a lease of an undivided moiety of minerals will, however, be specifically enforced : *Hexter v. Pearce*, (1900) 1 Ch. 341.

Joint vendors.

When two persons agree to sell property as tenants in common, and it turns out that one of them has no title to his share, the other of them will be compelled, at the instance of the purchaser, to convey his share, with an abatement of the purchase money, in the proportion which the share with the defective title bears to the share conveyed : *Horrocks v. Rigby*, 1878, 9 Ch. D. 180.

But where husband and wife agree to sell the wife's interest and the wife afterwards refuses to complete, the husband cannot be compelled to convey his interest, with an abatement of the purchase money : *Castle v. Wilkinson*, 1870, 5 Ch. 534.

Third
persons.

The purchaser has the same equity against a third person purchasing from his vendor with notice of the first purchaser's contract. Thus, in *Barnes v. Wood*, 1869, 8 Eq. 424, B. agreed to purchase from S. the fee-simple in certain land. It turned out that S. had only an estate *pur autre vie*, with remainder to his wife, and the wife refused to convey her interest. Afterwards,

knowing of B.'s contract, W. purchased from S., and took a conveyance from S. and his wife. It was held that W. was bound to convey to B. S.'s estate *pur autre vie*, the purchase money to be paid by B. being abated to the extent of the value of the estate of S.'s wife in remainder.

The rule applies also where the vendor has given an undertaking which he is unable to perform. In *Peacock v. Penson*, 1848, 11 Beav. 355, upon the sale of leaseholds, the vendor undertook to make a road, but was unable to carry out his undertaking without causing a forfeiture of the lease; he was compelled to convey with an abatement of the purchase money. Undertaking.

The Court sometimes refuses to decree partial performance with abatement on the ground of hardship to the vendor. In *Rudd v. Lascelles*, (1900) 1 Ch. at p. 820, the word "hardship" is used; but in most cases the ground of refusal is mistake, as in *Durham v. Legard*, 1865, 34 Beav. 611; or the extent of the error or deficiency, as in *Wheatley v. Slade*, 1830, 4 Sim. 126. In *Durham v. Legard* the vendor had described his property as containing 21,750 acres, when it only contained about half that quantity; the rental was accurately stated, and the vendor fixed the price by the rental; the purchaser was not allowed to insist on partial performance with an abatement. In *Wheatley v. Slade*, which was decided on a motion to dissolve an *ex parte* injunction, Shadwell, V.-C., held that the defendants, who were entitled to nine-sixteenths of an estate, and had, through mistake, contracted to sell the whole, could not be compelled to convey their interest with an abatement, especially as there was a lien on their interest which would exhaust nearly all the purchase money. The Vice-Chancellor thought that the ordinary rule would not apply "where a large portion of the estate cannot be conveyed." In *Maw v. Topham*, 1854, 19 Beav. 576, Romilly, M. R., without giving any reasons, refused to enforce specific performance with an abatement, the vendor having only three undivided fourths of what she purported to sell. Hardship.

More recent decisions, however, show that where there is no hardship the magnitude of the deficiency is not in itself a sufficient reason for deviating from the general rule that a purchaser is entitled to partial performance with abatement, if

abatement can be fairly assessed. In *Hooper v. Smart*, 1874, 18 Eq. 683, the vendors, who were entitled only to an undivided moiety of the property, the entirety of which they had agreed to sell, were compelled to convey their moiety, the purchase money being abated to one-half. In that case the vendors could not complain of hardship, because they would probably not have obtained so good a price if they had been selling their moiety as an "undivided moiety." In *Horrocks v. Rigby*, 1878, 9 Ch. D. 180, R. and L. contracted to sell for 200*l.* a leasehold public house, which they claimed to be entitled to as tenants in common subject to a mortgage for 400*l.* On examining the title, the purchaser discovered that L. had no interest, and that R. was entitled to a moiety subject to a mortgage, on which 240*l.* remained due. Partial performance with abatement was decreed against R. at the instance of the purchaser, although the abatement swallowed up the whole of the purchase money payable to R. There was no hardship here, because, though R. received no purchase money, he was practically relieved from the mortgage debt, and from his liability under the covenants in the lease.

In *Great Northern Railway and Sanderson*, 1884, 25 Ch. D. 788, land was sold "free from incumbrances" for 868*l.* It was afterwards discovered that the land was subject to a perpetual rent-charge of 63*l.* On the application of the purchaser that the vendors should be ordered, under the Conveyancing Act, 1881, s. 5, to pay money into Court to discharge the incumbrance, Pearson, J., refused to make the order, partly on the ground that the sum required to discharge the incumbrance would be nearly three times the amount of the purchase money, and it would be inflicting a hardship on them to enforce the contract. In that case the vendors were entitled to rescind under a condition for rescission.

What is
hardship.

There is not sufficient authority to make it possible to lay down with any certainty what constitutes hardship in the estimation of the Court. Perhaps it is advisable that some elasticity should be retained in such matters, and this may be the reason why the Court is in the habit of reminding itself that the relief by way of specific performance is in the discretion of the Court. As has

been already said, the extent of the error does not necessarily involve hardship, nor does the fact that a mistake has been committed. It may be suggested that the case of a deficiency in acreage is more likely to be one of hardship than is the case of a defect in title to part of the property, because in the first the vendor has to convey the whole estate with an abatement of purchase money, even though when contracting he fixed the purchase money by reference to the rental or to the price *he* paid when he purchased ; but in the second he conveys only that part of the property to which he has a good title, getting a fair price for it and retaining the other part, his title to which is defective. Another distinction is suggested—viz. that the Court is more likely to relieve the vendor if his mistake consists of an inadvertent misdescription, than where his mistake is as to the size, quality, &c. of the land, which is the subject-matter of the contract. Thus, given a piece of land containing 100 acres ; now, if the vendor, knowing that the land contains 100 acres, yet by inadvertence, or still more by his agent's blunder, describes it as containing 200 acres, it would be a hardship if the purchase money were reduced to one-half, because the vendor probably accepted the purchase money offered, or, if selling by auction, fixed the reserve price, by reference to the acreage known to him. But if the vendor, imagining the land to be 200 acres in extent, so describes it, there would seem to be no hardship in reducing the purchase money to one-half upon discovering that the land itself contained only one-half, unless it could be shown that the vendor fixed the price otherwise than by reference to the acreage. This distinction appears to be supported by what took place in *McKenzie v. Hesketh*, 1877, 7 Ch. D. 675. There the plaintiff's tender for a lease of a farm of 249 acres at 500*l.* was accepted by the defendant's agent, who thought that the acreage in the plaintiff's tender was the same as that in another person's tender—viz. 235 acres, the acreage of the farm being really only 214. The defendant was compelled to grant a lease of the 214 acres, the rent being reduced in the proportion not of 249 to 214, but of 235 to 214. It is difficult to see why the plaintiff accepted the Judge's suggestion (see p. 679 of the Report) that 235 acres should

be taken as the basis of the rent of 500*l.*, instead of 249, the acreage actually mentioned in the tender, unless it was thought that the mistake of the defendant's agent as to the contents of the plaintiff's tender was a mistake of such a nature as to induce the Court to refuse partial performance with abatement, while the mistake of the defendant's agent as to the actual acreage of the farm was a different sort of mistake, and one which would not prevent the Court from granting partial performance with abatement. It may also be remarked that the Court is more likely to treat a vendor with indulgence if the mistake made is the mistake of the agent alone: per Fry, J., *ibid.* at p. 680.

Where the vendors described as "about 1,200 square yards" property which really contained only 935 square yards, the purchaser was held entitled to compensation under a condition for compensation, notwithstanding the alleged hardship to the vendor: *Aspinalls to Powell*, 1889, 60 L. T. 595. It does not appear that in that case the vendors had ever received any rent for the property, and their mistake was caused by their surveyor, whose valuation was shown to the purchaser before the sale, and no doubt influenced him in fixing the price he gave. The surveyor's valuation would be based on his measurement, so there would appear to be no hardship to the vendors in reducing the purchase money when the measurement was discovered to be wrong. Kekewich, J., held there was no hardship.

Prejudicial to
third persons.

The vendor will not be ordered to convey his partial interest where this order might be prejudicial to the interests of a third person interested in the property, and towards whom the vendor stands in a fiduciary or a quasi-fiduciary relation.

Thus, in *Thomas v. Dering*, 1837, 1 Keen, 729, where the vendor had merely a life estate under a settlement, without impeachment of waste, with remainder to his sons in tail male, the Court refused to compel him to convey this partial interest, as the conveyance might be injurious to the remaindermen by putting it into the power of a stranger to commit waste.

So, where one of three trustees, who was also beneficially entitled to one-fifth of the property, contracted to sell the entirety expecting the other trustees would join, on their

refusal he was not compelled to convey his own one-fifth, on the ground that it was trust property, and it might have injured the other *cestuis que trust* by causing a severance : *Naylor v. Goodall*, 1877, 47 L. J. Ch. 53.

As to partial performance of a contract to lease, which, if specifically performed, would be a fraud on a power, see *Harnett v. Yeilding*, 1805, 2 Sch. & L. 549, and other cases in *Farwell on Powers*, pp. 331, 348, 349. Fraud on power.

The rule laid down at p. 99 is subject also to the general rule that if the vendors are trustees who have no power to sell, or who conduct the sale in such a manner that the sale, if carried out, would be a breach of trust, the Court will not, even at the instance of the purchaser, compel the trustees to complete : *Ord v. Noel*, 1820, 5 Mad. at p. 440. In *Mortlock v. Buller*, 1804, 10 Ves. 292, a tenant for life selling as agent for the trustees fixed the amount of the purchase money without being informed by the auctioneer of the result of a re-valuation of the property, which showed that the property was worth 5,000*l.* more than was at first supposed. Upon hearing of the re-valuation, the trustees refused to adopt the contract of the tenant for life, and the Court held that they could not be compelled to complete, as the sale would, under the circumstances, be a breach of trust. Trustees.

Where trustees have, through want of reasonable diligence, misdescribed the property, or neglected to guard against defects of title by properly drawn conditions, the Court will not grant compensation to the purchaser, even though there is a condition for compensation. See *White v. Cuddon*, 1842, 8 Cl. & F. 766. At p. 797 of that case Lord Campbell says : “ The consideration that they sold as trustees is enough to show that specific performance, making compensation, ought not to have been decreed. It is an implied condition that trustees to sell will use all reasonable diligence to obtain the best price.” But if the error of the trustees was not caused by a want of reasonable diligence, the Court will allow compensation to the purchaser or enforce the trustee’s contract to give compensation. In *Crompton v. Melbourne*, 1832, 5 Sim. 353, a contract by trustees to give compensation was enforced by the Court. In *Hill v. Buckley*, 1811, 17 Ves. 394, partial performance with compensation was enforced

against trustees whose agent had misstated the acreage of the property. In that case it is even doubtful whether the agent had acted with reasonable diligence, and there was no condition for compensation.

If a mortgagee has had to allow compensation for misdescription owing to a blunder committed by himself or his agent, and has thereby reduced the price, the persons entitled to the equity of redemption may, in taking the accounts, charge the mortgagee with the difference between the price realised and that which the property would have realised if there had been no misdescription: *Tomlin v. Luce*, 1889, 43 Ch. D. 191.

In *Dunn v. Flood*, 1885, 28 Ch. D. 586, a condition allowing compensation was said to be a usual condition.

Agent who is
partial owner.

Where a partial owner contracts to sell on behalf of the trustees, without informing the purchaser that he is contracting merely as agent, it would seem that, on the refusal of the trustees to carry out the sale, the purchaser cannot compel the partial owner to convey his interest, making an abatement of the purchase money. In *Mortlock v. Buller*, 1804, 10 Ves. 292, the partial owner, who was equitable tenant for life, contracted to sell not as owner, but as agent for the trustees, who either had not given him authority to act, or would, under the circumstances of the case, if the sale were completed, be committing a breach of trust, so that the Court could not enforce the contract against them. The Court also refused to enforce it so far as concerned the partial interest, with abatement for the deficiency, on the ground that the partial owner intended not to sell as owner, but as agent for the trustees.

(iii) *Purchaser desiring to complete without compensation*

If the purchaser is willing to waive the objection to the defect, he may compel the vendor to convey such interest as he has, where the Court would refuse to decree compensation or an indemnity. See *Western v. Russell*, 1814, 3 Ves. & B. at p. 192; and *Wood v. Griffith*, 1818, 1 Wilson, Ch. at p. 44.

Procedure.

A claim for compensation (whether for a defect in title or for a misdescription) may be entertained on a vendor and purchaser summons. In section 9 of the Vendor and Purchaser Act, 1874,

the words "not being a question affecting the existence or validity of the contract" only qualify the words "any other question"; they do not qualify the words "any claim for compensation." The following are instances of the question of compensation for misdescription being decided on summons: *Fawcett and Holmes*, 1889, 42 Ch. D. 150 (condition for compensation); *Turner and Skelton*, 1879, 13 Ch. D. 130 (condition for compensation); *Terry and White*, 1886, 32 Ch. D. 14 (condition excluding compensation).

2. METHOD OF ASSESSING COMPENSATION

In decreeing specific performance with compensation, the Court must be satisfied not only that compensation can be assessed, but that it can be fairly assessed. It is, of course, always possible to assess compensation, just as it is always possible to measure damages for injuries to the body, the feelings, or the reputation. But in assessing damages for a tort it is not considered necessary nicely to weigh the damage in the interest of the aggressor, justice being satisfied if the damages given to the person injured are sufficient, and not caring if they may happen to be too much. In computing compensation for a misdescription, however, the rough calculations of a jury are unsuitable: the interests of the vendor have to be considered as well as those of the purchaser, and if the compensation does not admit of a pecuniary valuation which shall be as fair to the vendor as it is to the purchaser, the Court will probably refuse to make a rough estimate or an educated guess.

Possibility of assessing compensation.

The following cases establish the proposition that where compensation cannot be assessed fairly the Court will not decree specific performance with compensation: *Thomas v. Dering*, 1837, 1 Keen at p. 746; *White v. Cuddon*, 1842, 8 Cl. & F. 766; *Graham v. Oliver*, 1840, 3 Beav. at p. 128; *Cox v. Coventon*, 1862, 31 Beav. at p. 391; *Cato v. Thompson*, 1882, 9 Q. B. D. at p. 618; and *Rudd v. Laseelles*, (1900) 1 Ch. 815. It is true that in the cases of *Seaman v. Vawdrey*, 1810, 16 Ves. 390, and *Ramsden v. Hirst*, 1858, 4 Jur. N. S. 200, compensation was assessed for the absence of title to minerals which might be thought not to admit of a fair assessment, but it was not suggested in these cases that compensation could not be fairly assessed.

The mere difficulty of assessment, where a fair assessment is possible, will not, however, deter the Court. In some cases, where the possibility of assessment was doubtful, the Court has directed an inquiry whether compensation can be assessed.

Inquiry.

In *Barnes v. Wood*, 1869, 8 Eq. 424 ; Reg. Lib. 1868, A. 2078, a reference to chambers was directed to ascertain the amount of compensation. In *Hill v. Buckley*, 1811, 17 Ves. 394 ; Reg. Lib. 1810, A. 1333, the order was that the abatement should be settled by the Judge. In *Nelthorpe v. Holgate*, Reg. Lib. 1843, B. 952, it was referred to the Master to inquire and state to the Court "what will be a fair and proper compensation to make to the plaintiff out of the purchase money in respect of such life estate." In *English v. Murray*, 1883, 49 L. T. at p. 39, the Court directed an inquiry "whether any and what abatement ought to be made" from the purchase money. In *Aspinalls to Powell*, 1889, 60 L. T. 595 (a vendor and purchaser summons adjourned into Court by the Registrar of the Liverpool District Registry), Kekewich, J., referred it to the district registrar to ascertain what deduction was to be made from the purchase money.

Purchaser's
conduct.

The conduct of the purchaser, or the calculations made by him in fixing the price which he offered, sometimes enables the Court to assess compensation in a case which would not otherwise admit of computation.

In *Baker v. Bent*, 1830, 1 Russ. & M. 224, which was an action to rescind the sale of a contingent reversion because of inadequacy of price, the Court, after stating that as a general rule it was impossible to assess the value of a contingent reversion, fixed the value in that case as half the value which such reversion would have borne if it had been absolute instead of contingent ; arriving at this decision on the ground that the purchaser himself had offered one sum under the impression that the reversion was absolute, and on hearing of the contingency had reduced his offer to half that sum.

Again, in *Powell v. Elliot*, 1875, 10 Ch. 424, where the vendor had overstated the annual profits of a colliery which he was selling, the purchase money itself was taken as the basis for calculating the amount of compensation—viz. the capitalised value of the deficiency in the profits, because the purchaser had,

by offering such sum, shown how he himself capitalised the annual profits as stated by the vendors. Some of the cases cited below further illustrate the proposition, that if the Court can find a way of giving compensation to the purchaser without inflicting disproportionate injury on the vendor it will do so, however difficult the task may be ; some of the cases even going so far as to suggest that the Court will not always measure the proportion of injury to the vendor or consider the probability of the abatement being unfair to him.

If the purchaser claims compensation for the property being less valuable than it was described to be, and the vendor has in some other respect under-stated the value of the property, the Court will set off the excess in the value of the property against the deficiency. Set-off.

Where land was sold subject to the "Eau Brink" tax, and also to a corporation tax, and the amount of the Eau Brink tax was over-stated, whilst that of the corporation tax was under-stated, the Court, in estimating the compensation due to the purchaser, deducted the difference in the amount of the Eau Brink tax from the amount of the excess of the corporation tax : *Townshend v. Granger*, c. 1820, 9 L. J. o.s. Ch. 176.

And similarly, if the vendor claims compensation under a condition for compensation, the Court will deduct compensation for any over-statement which he has made of the value of the property from the amount to be awarded to him as compensation for the property being more valuable.

Thus, where there was a deficiency of 10 acres in one parcel, and an excess of 20 acres in another, and the vendor claimed compensation under the condition, the deficiency was set off *pro tanto* against the excess : *Leslie v. Tompson*, 1851, 9 Ha. 268.

It is impossible to lay down any general rule as to what will induce the Court to say that compensation cannot fairly be assessed. The following suggestions are offered with some diffidence : What defects admit of compensation.

In cases of doubtful title, it would seem that the diminution in value of an estate arising from the possibility of the existence of a defect whose existence is not proved does not admit of calculation. If, therefore, the purchaser insisted on completion, Doubtful title.

the Court would probably decide either that the defect existed or that it did not; the purchaser, however, could resist specific performance under the general principle that a doubtful title cannot be forced on a purchaser. Thus, in *Morris v. Preston*, 1802, 7 Ves. 547, the purchaser desired partial performance with abatement for a lease which he said affected the property. The lease was an agreement for a lease of a farm to a clergyman for the purpose of occupation, which appeared, though this was doubtful on the cases, to be void under 21 Hen. VIII. c. 13. The Judge, though apparently doubtful whether the lease was good or not, decided that it was bad, and that the purchaser was not entitled to compensation. If the purchaser had preferred to rescind, the question whether the lease was good or not would probably not have been decided.

Technical
defect of title.

In the case of a mere technical defect of title, it would seem that a purchaser ought not to be able to enforce partial performance with abatement, because if he objects to the defective title the remedy is in his own hands; he can rescind the contract. If he is willing to accept the title notwithstanding the technical defect, he will in all probability meet with no difficulty in selling the property again, especially if he employs suitable conditions of sale. Whether this is so or not, the difficulty of re-selling caused by the defect in title would seem to be one of those things which do not admit of calculation. Thus, in the case of the sale of a house in a residential neighbourhood by a vendor who has no title to the minerals, but omits to mention the defect, the purchaser may, of course, rescind, because the defect is an essential defect of title; but if he desires to complete, it would be unfair to give him any compensation for the defect, since, the enjoyment of the property being unimpaired by the defect, the difference in value (if any) can only arise from the diminished saleableness of the house, which is too uncertain to admit of computation. But see pp. 118-120.

Duration of
life.

Any deficiency in the vendor's interest, which depends on the duration of a life, will be assessed by the Court by an actuarial computation. The chance that the duration of the life may be so different from the actuary's estimate as to give the purchaser both the estate and the compensation, does not

make this method of assessment unfair ; because the purchaser is equally exposed to the risk of the compensation being, in the event, too small, and the Court will "throw the chances together" : per Lord Eldon in *Milligan v. Cooke*, 1808, 16 Ves. 1.

Possibly the Court might hold compensation capable of assessment, if there is an express condition for compensation, in cases where in the absence of that condition the Court would have refused to assess compensation : see *Rudd v. Lascelles*, (1900) 1 Ch. at p. 820 ; *Price v. Macaulay*, 1852, 2 D. M. & G. at p. 344 ; *Painter v. Newby*, 1853, 11 Ha. 26. And if the condition points out a method of assessing compensation, this strengthens the case : *Leslie v. Thompson*, 1851, 9 Ha. at p. 274.

The cases illustrating the method of assessing compensation may be arranged under the following heads : (1) tenure, (2) duration of lease, (3) contingency admitting of actuarial computation, (4) contingency not admitting of actuarial computation, (5) quantity, (6) incumbrances, (7) profits, (8) minerals, (9) timber, and (10) other matters.

1. *Tenure*

The difference in value between freeholds and copyholds would probably not admit of compensation. But the difference in value between freeholds, and copyholds in regard to which the suits and services were compounded for the fines, reliefs, and heriots, were fixed and nominal and the right to the timber and minerals was in the tenant, was held to admit of compensation in *Price v. Macaulay*, 1852, 2 D. M. & G. at p. 344 (where the condition for compensation included misstatements as to tenure).

2. *Duration of Lease*

A deficiency in the duration of a term of years may be measured thus : the net profits of the land during the period between the termination of the actual term and the termination of the term mentioned in the particulars may be regarded as an annuity, and the present value of that deferred annuity will then be the measure of compensation for the deficiency in the term. See Clerk and Humphrey's "Sales of Land," p. 356. Where a term of thirty-four years was described as thirty-eight

Condition
for compensa-
tion.

Tenure.

Duration
of lease.

years, compensation was decreed for the deficiency, to be referred to chambers unless the parties agreed the amount : *Re Perriam*, 1883, 49 L. T. 710.

Where land sold in January, 1842, was described as occupied by C. as a tenant from year to year, at a rent of 80*l.* per annum, payable on 1st May and 1st November, the fact being that C. was a lessee with a power of determining on the 25th March in any year at six months' notice, and had given due notice to determine the tenancy on the 25th March, 1842, the Court thought the proper amount of compensation would probably be one year's rent : *Martin v. Cotter*, 1845, 8 Ir. Eq. R. 147.

The difference in value between a legal term of thirty-one years and a legal term of twenty-one with an additional equitable term of ten years, was referred to the Master to assess in *Hanbury v. Litchfield*, 1835, 2 My. & K. 629.

The difference between a term of twenty-one years absolute and a term of twenty-one years determinable on the vendor's death admits of actuarial computation. See *Dale v. Lister*, cited 16 Ves. 7.

Lease for
lives.

Where the land sold was subject to (undisclosed) leases for lives at a low rent, the Court directed compensation to be assessed : *Hughes v. Jones*, 1861, 3 D. F. & J. 307. The probable duration of the leases might be computed by an actuary.

Renewable
leaseholds.

The difference in value between leaseholds where there is a custom to renew, and leaseholds which may or may not be renewed at the individual or arbitrary will of the lessor, who has, however, a *habit* of renewing at the same rent and the same fine, seems an incalculable quantity. But the Court, in *Painter v. Newby*, 1853, 11 Ha. 26, treated such leaseholds as non-renewable, disregarding the lessor's habit of renewal. In that case the property was described as "customary leasehold held of the lord of the manor of B., and renewable every twenty-one years on payment of the customary fine at an annual rent of 10*s.*," and it was afterwards discovered that there was no custom of renewing. The Court directed an inquiry as to the difference in value "between a leasehold interest renewable every twenty-one years on the payment of the customary fine (calculated on the same principle as the fine paid on the last

renewal), and at the annual rent of 10s., and the value of the interest in the same property which the vendor is capable of conveying to the purchaser." There was a condition for compensation in that case : see above, p. 111.

In *Besant v. Richards*, 1830, Taml. 509, compensation was decreed in respect of an existing tenancy of an inn, stated by the vendor to be a void agreement. But in *Linehan v. Cotter*, 1844, 7 Ir. Eq. R. 176, it was decided that an outstanding lease was not a subject for compensation.

3. Contingency admitting of Actuarial Computation

Where the extent of the deficiency depends on the contingency of the duration of a life, the amount of compensation can usually be computed by an actuary. Duration of life.

If, instead of having the fee-simple, the vendor turns out only to have an estate in remainder expectant on the termination of a life estate, the amount of compensation is the value of the life estate, to be assessed by an actuary : *Nelthorpe v. Holgate*, 1844, 1 Coll. at p. 223 ; *Barker v. Cox*, 1876, 4 Ch. D. 464. Remainder.

The method apparently followed by the Court—viz. to deduct from the purchase money the value of the life interest—does not, however, produce a perfectly accurate result. The life interest and the reversion by being sold together fetch a higher price. The proper amount of compensation, therefore, would seem to be to value separately the life estate and the reversion, and to deduct from the purchase money a sum bearing the same proportion to the full purchase money that the value of the life interest bears to the total values of the life interest and reversion, valued separately : *Cooper and Allen*, 1876, 4 Ch. D. 807.

An actuarial valuation may also be made, where the vendor professing to sell the fee has only a life estate : *Mortlock v. Buller*, 1804, 10 Ves. at p. 316 ; or an estate *pur autre vie* : *Barnes v. Wood*, 1869, 8 Eq. 424. Life estate.

In *Thomas v. Dering*, 1837, 1 Keen, 729, where the vendor had a life estate and also a remainder in fee expectant on his death without issue, the Court refused to decree partial performance with abatement, partly, perhaps, on the ground of the difficulty of computing compensation, but chiefly on the ground that

specific performance would be prejudicial to the interests of third persons.

The case of the vendor being only entitled *jure mariti*, instead of being owner in fee, would also seem to admit of actuarial computation. See *Jones v. Evans*, 1848, 17 L. J. Ch. 469.

Dower.

The possibility of the vendor's wife, who refuses to release her dower, surviving the vendor would seem to admit of actuarial computation. See *Re Hall's Estate*, 1870, 9 Eq. 179, a case under the Lands Clauses Act. But in *Wilson v. Williams*, 1857, 3 Jur. N. S. 810, an indemnity was given instead of an abatement being made.

On a sale of leaseholds which were usually renewed every seven years, the vendor guaranteed a term of twenty-one years certain, and it afterwards appeared that as to 24 acres, parcel of such leaseholds, he had only a life interest. It was referred to the Master to determine the difference in value between the absolute term of twenty-one years, and such an interest as might be disappointed by the cesser of the vendor's life: *Dale v. Lister*, cited 16 Ves. 7, 11.

On a contract to grant a lease of a fishery for three lives or thirty-one years, when it was discovered that the lessor, being merely tenant for life, had no power of leasing beyond his own life, the lessor was compelled, at the instance of the lessee, to grant a lease for his own life, and to give compensation for the difference in value between such lease and the lease he had agreed to grant: *Leslie v. Crommelin*, 1867, Ir. R. 2 Eq. 134.

Death with-
out children.

On the sale of a reversion expectant on the death of A. without children, a misrepresentation of A.'s age may involve contingencies not admitting of actuarial or other computation.

4. *Contingency not admitting of Actuarial Computation*

Other con-
tingencies.

Contingencies other than that of duration of life (which admits of actuarial computation) will not be assessed by the Court.

Thus, when a reversion expectant on the death of A. (a man) without children, is being sold, and A.'s age is described as sixty-six, being really sixty-four years, the contingency of A. having children is materially altered, and the Court will not estimate the difference between the probability of a man aged

sixty-four having children, and the probability of a man aged sixty-six having children. See *Sherwood v. Robins*, 1828, Moo. & Mal. 194. If A. had been a *woman*, or if the ages had been eighty-four and eighty-six, instead of sixty-four and sixty-six, the contingency of the birth of children would have been reduced to an impossibility, and the Court would, no doubt, have assessed the difference in value between the reversion as described and the reversion actually sold.

5. Quantity

Compensation for a deficiency in quantity is in simple cases Quantity. ascertained by a rule of three sum. Thus, suppose a deficiency of 7 acres out of 40. Then, as 40 acres is to 33 acres, so is the agreed purchase money to the purchase money which the vendor is entitled to receive. See *Leslie v. Thompson*, 1851, 9 Ha. 268. In a contract to grant a lease, a deficiency in quantity is compensated for by a proportionate reduction of the rent (and also of the premium, if any). See *McKenzie v. Hesketh*, 1877, 7 Ch. D. 675.

This simple method is, however, inapplicable in many cases. Thus, on the sale of land containing buildings, compensation ought not to be measured simply by the deficiency of acreage : *Terry and White*, 1886, 32 Ch. D. at p. 25.

Where woodland is described as of larger acreage than it really is, but the purchaser is correctly informed as to the value of the wood itself, the proper compensation is an abatement of the purchase money to the extent of the value of the missing acres as woodland less the value of the wood thereon ; in other words, “the abatement is to be only so much as soil covered with wood would be worth after deducting the value of the wood” : *Hill v. Buckley*, 1811, 17 Ves. 394.

If the deficiency in the acreage is caused, not by the fact that the land is smaller than was thought, but by the fact that part of the land belongs to a stranger, the position of the purchaser is in some cases so altered as to make the misdescription essential—*e.g.* where twelve acres opposite to the park gates turned out not to be the vendor’s property : *Knatchbull v. Grueber*, 1815, 1 Mad. 150. In another case where two acres in the centre of

a park of 141 acres turned out not to be the vendor's property, the compensation was referred to the Master for assessment, with an intimation from Lord Thurlow that more ought not to be allowed "than if it lay in the middle of a waste at the farthest end of the kingdom": *Calcraft v. Roebuck*, 1790, 1 Ves. jun. at p. 226. This, however, appears to have been due to the conduct of the purchaser, who had taken possession forcibly.

Undivided
share.

If the deficiency is not in the acreage, but in the amount of the share to which the vendor is entitled—*e.g.* if the vendor is entitled to one undivided half part instead of to the whole—the rule of three method is still applied. But it would seem that, if compensation is to be accurately assessed, the purchaser is entitled to some additional compensation in such cases on the ground that an undivided half is not exactly half as valuable as the entirety. The rule of three is fairly applied on a deficiency in acreage, for 20 acres of pasturage is, as a rule, just half as valuable as 40 acres of pasturage; but it does not follow that an undivided half share of 40 acres is half as valuable as the entirety of 40 acres, as there must, in the latter case, be some expenses incurred in partition before the purchaser becomes entitled absolutely to his 20 acres.

In *Hooper v. Smart*, 1874, 18 Eq. 683, where the vendor was entitled to an undivided moiety instead of the entirety, the purchase money was simply reduced to one-half.

In *Jones v. Evans*, 1848, 17 L. J. Ch. 469, where the vendors agreed to sell two undivided sixths of certain leaseholds, being entitled only to two undivided sixths of two-thirds thereof, a third of the purchase money was deducted. This appears from Reg. Lib. 1847, A. 2333, the sum deducted being 46*l.* 13*s.* 4*d.*, being one-third of the purchase money of 140*l.*

Agreement
to lease.

The same principle has even been applied to an agreement to lease. In *Burrow v. Scammell*, 1881, 19 Ch. D. 175, the lessor being entitled only to an undivided moiety of a house instead of the entirety, the rent was reduced to one-half. It is difficult to see what good a lease of an undivided moiety of a house would be to the lessee; but it appears that the lessee had been in possession for three years, and expended a good deal of money on the house.

6. *Incumbrances*

The case of ordinary mortgages presents no difficulty. But in the case of rent-charges and other annual payments, which have been either under-stated or omitted altogether by the vendor, compensation very often cannot be assessed. The proper method of assessing compensation is, of course, to capitalise the value of the rent-charge, &c., or of the excess thereof above the amount stated in the particulars. But if the purchaser has simply paid so much per acre for the land, the Court cannot tell how many years' value he has given for the property. If, however, the purchaser has estimated the value of the property by capitalising the rents or income derivable therefrom, he affords the Court a fair test of the value of the excess in the amount of rent-charges, &c. If he thinks the property worth twenty years' purchase, the Court may very fairly take twenty years as the basis of capitalisation of the excess of the rent-charges &c. under-stated by the vendor. The purchaser's capitalisation of the income of the property, where that income is liable to reduction on account of unfixed and unascertainable outgoings, such as repairs, affords no test of the value of the excess of a fixed outgoing—*c.g.* ground rent—above the amount stated in the particulars.

Incumbrances.

On the sale of tithes, it was found that there was an annual fee-farm rent, and also an annual payment for the benefit of the poor, charged on the tithes. Compensation for these incumbrances was assessed at twenty-nine years' purchase, this being the number of years' purchase at which the purchaser had bought the tithes themselves: *Horniblow v. Shirley*, 1806, 13 Ves. 84.

In *Powell v. South Wales Ry. Co.*, 1855, 1 Jur. N. S. 773, both compensation and an indemnity by personal covenant were given. The method of assessing compensation for the undisclosed incumbrance—*viz.* a rent-charge of 20*l.* issuing out of 122 acres, of which only 3½ acres were being sold—was to deduct from the purchase money such an amount as should bear to the value of the rent-charge (which was considered by the Master worth 500*l.* or twenty-five years' purchase) the same proportion

that the $3\frac{1}{2}$ acres bore to the whole estate of 122 acres: see below, p. 124.

In *Bainbridge v. Kinnaird*, 1863, 32 Beav. 346, no compensation was ordered for an undisclosed charge of 15,000*l.* for portions, the land sold being only a part of a large estate (rent roll 20,000*l.* a year) charged with the said sum of 15,000*l.*

7. Profits

Profits.

If the rental or annual profits are over-stated, the proper compensation will be a reduction of the purchase money by the capitalised amount of the excess of rental or profits. The capitalisation will be ascertained, not by a fixed number of years, but by the analogy of the purchase money itself, which the purchaser (if not the vendor) is supposed to have fixed with reference to the rental or profits as stated by the vendor.

On the sale of a colliery as a going concern, the net annual profits were stated by the vendors as 66,049*l.*, which exceeded the actual profits by 9,500*l.* Compensation for this misrepresentation was assessed thus: the purchase money, 365,000*l.*, was taken as the basis of calculation and treated as the value ascertained by the bargain itself. After deducting from the purchase money certain sums as the present value of the future auction value of the plant, the sum of 361,674*l.* remained as the capitalised value, according to the estimate of the vendors and purchasers themselves, of the annual profits as stated by the vendors—viz. 66,049*l.* We then have a simple rule of three sum. As 66,049*l.* is to 361,674*l.*, so is 9,500*l.* to the sum to be deducted as compensation: *Powell v. Elliot*, 1875, 10 Ch. 424.

Fines arbitrary.

The difference in value between a manor in which the fines are arbitrary and one in which they are certain, is impossible of assessment: *semble*, *White v. Cuddon*, 1842, 8 Cl. & F. 766.

8. Minerals

Minerals.

It is doubtful whether compensation can be fairly assessed for the absence of title to the minerals. In *Smithson v. Powell*, 1852, 20 L. T. o.s. 105 (*dictum*), and *Bunbury's Estate*, 1867, Ir. R. 1 Eq. 458 (decision), compensation for this defect was considered not to admit of calculation. In *Seaman v. Fawdrey*,

1810, 16 Ves. 390; *Ramsden v. Hirst*, 1858, 4 Jur. N. S. 200; and *Jackson v. Haden*, (1906) 1 Ch. 412, compensation was decreed.

In *Seaman v. Vawdrey* (which was a case of salt works to which the vendor had no title, as they had been reserved out of the conveyance to the vendor's predecessor in title), it was the vendor who was suing for specific performance, and it does not appear from the report whether the vendor would have preferred to have the contract rescinded. In *Ramsden v. Hirst*, Kindersley, V.-C., intimated that he would have decided differently, if the case had been *res integra*. In that case and in *Jackson v. Haden* there was a condition allowing compensation. See above, p. 111.

In *Smithson v. Powell*, 1852, 20 L. T. o.s. 105, Lord St. Leonards said: "I am of opinion that the Court would not grant compensation for the right to take coal. It was said that the coal was not worth the digging for; but it might be worth three or four thousand pounds. How then was the Court to estimate its value? Can it be said that the purchaser ought to have two-thirds more than the whole purchase money as a compensation for the loss of the right to take coal under the surface of his purchase?"

If it is doubtful on the authorities whether compensation for minerals is capable of assessment, the proper method of assessment is more doubtful still. The method adopted by Kindersley, V.-C., in *Ramsden v. Hirst*, according to the report of that case in 4 Jur. N. S. 200, was to deduct from the purchase money the value of the minerals, to be ascertained by an expert appointed by the Judge. The decree, however, does not bear out the report; it merely declares that the purchaser "is entitled to compensation out of his purchase money in respect both of an outstanding right under the agreement of 22 Nov. 1823 to enter the land and sink shafts and work the mines, and also of the purchaser being precluded from working the coal (if any) under the said land himself": Reg. Lib. 1857, B. 1259. A subsequent order shows that 195*l.* was paid to the purchaser for compensation, the amount of the purchase money being 2,241*l.*: see Reg. Lib. 1857, B. 1354.

Method of
assessment.

Where, as in *Ramsden v. Hirst*, it is not known whether there are any minerals at all, the employment of an expert to ascertain their value seems to be about as judicial a proceeding as tossing a coin in the air. If the land sold is situated in an agricultural neighbourhood, the fairest method of assessment would be to estimate the value of the land as agricultural land, and then, if necessary, to reduce the purchase money to such estimated value. If the property sold is a house in a residential neighbourhood, it seems impossible to say how much less the property is worth on account of the absence of title to the minerals, since, the enjoyment of the property being unimpaired by the defect, the difference in value could only arise from the diminished saleableness of the house, owing to what might be called a technical defect of title, and this is too uncertain to admit of computation. But even in the case of a house, the possibility of subsidence might be a ground for compensation; and the fact that any one working the minerals might have to compensate the owner of the surface for damage done by his working would not necessarily preclude the purchaser's right to compensation against the vendor, since the selling value of the house might be diminished to an extent exceeding the amount of compensation to be got from the mine-worker.

9. *Timber*

Timber.

On the sale of a timber estate, the description used was "sixty acres of fine oak timber trees, the average size of which approaches fifty feet." Counting as timber trees those which contained at least ten cubic feet, the average size was thirty-four feet six inches; counting in smaller trees, the average size was twenty-two feet. The Court held that there had been a misdescription, but that, as the particulars of sale did not give the number of trees, or the total quantity of timber, the Court could not assess compensation: *Brooke v. Rounthwaite*, 1846, 5 Ha. 298.

10. *Other Matters*

"In occupation of B."

Where land leased to and in the occupation of T., whom the purchaser did not know, had been described as "let on lease and in the occupation of B.," whom the purchaser knew as a highly respectable and responsible person, the misdescription was con-

sidered not to admit of compensation : see *Ridgway v. Gray*, 1849, 1 Mac. & G. 109. That was a sale by the Court under a condition for compensation in case of misdescription, the amount of compensation to be settled by the Master. The Master in his report (dated 12th July, 1848) had assessed the compensation at 240*l.* (two years' rental of the property), the amount of the purchase money being 2,100*l.* His method of assessment does not appear in the report. The Lord Chancellor (see report above cited, and Reg. Lib. 1848, B. 771) discharged the order directing the reference to the Master on the ground of informality, but also expressed an opinion that the case was not one for compensation. It is not clear whether the purchaser was entitled to rescind or not. In *Grissell v. Peto*, 1854, 2 Sm. & G. 39, where a house (in the result) leased to Lord B. was described as leased to Mr. A., the purchaser was neither allowed to rescind nor to insist on compensation.

The difference in value between two sums of 3*l.* 14*s.* and 3*l.* 15*s.*, redeemed land tax chargeable on two several properties, and six several sums of 1*l.* 12*s.*, 1*l.* 1*s.*, 1*l.* 1*s.*, 1*l.* 5*s.*, 1*l.* 5*s.*, and 1*l.* 5*s.*, chargeable respectively on different portions of the said two properties, does not admit of computation : *Cox v. Coventon*, 1862, 31 Beav. 378. Redeemed
land tax.

In *Milligan v. Cooke*, 1808, 16 Ves. at p. 12, Lord Eldon questioned whether it were possible to estimate the difference in value between a covenant by the life tenant that his issue would renew certain leaseholds, such covenant binding all the real and personal assets of the covenantor, and a similar covenant merely binding such part thereof as he might devise and bequeath to his issue. But the Master was directed to ascertain the difference in value if possible, an option being given to the purchaser to take an indemnity, if he so preferred. See p. 14 of the report. Value of
a man's
covenant.

It would seem that compensation could not be assessed in respect of reservations to the Crown of all land that might be required for public ways, of all timber required for naval purposes and public works, of all gold, silver, and coal, and the power of resumption at a valuation of all lands required for public purposes, especially as other land, not the subject of the Reservations
to the Crown.

contract, was included in the same grant by the Crown, and the whole was liable to forfeiture in case the conditions were not observed : *Westmacott v. Robins*, 1861, 4 D. F. & J. 390, where, however, the purchaser did not press for partial performance with abatement.

Restrictive
covenants.

The existence of restrictive covenants is not a matter for which compensation can be assessed : *Rudd v. Lascelles*, (1900) 1 Ch. 815, citing *dictum* of Jessel, M. R., in *Cato v. Thompson*, 1882, 9 Q. B. D. p. 618.

Roads.

Compensation for the absence of roads has sometimes been decreed : as in *Peacock v. Penson*, 1848, 11 Beav. 355 (but the decree itself contains no order for compensation : Reg. Lib. 1848, B. 257).

The measure of compensation for the description of an incomplete road as "made up" is not the cost of making up the road, but the difference between the actual value of the property in the condition in which it was at the time of the sale, and the value it would have had if the road had been made up as represented : *Re Chifferiel*, 1888, 40 Ch. D. 45.

Sporting
rights.

It is doubtful whether the fact that third persons have a right of sporting over the property is a defect for which compensation could be assessed : *Burnell v. Brown*, 1867, 1 J. & W. 168.

CHAPTER XIII

INDEMNITY

WHERE it is impossible to assess fairly the difference in value between the thing sold, and that which the vendor can convey, the Court sometimes, at the instance of the purchaser, instead of rescinding the contract, decrees partial performance with an indemnity, compelling the vendor either to execute some security (preferably of real estate) or to pay the purchase money, or a sufficient portion thereof, into Court to abide the event. Indemnity.

Thus, in *Milligan v. Cooke*, 1808, 16 Ves. 1, the Court ordered (the purchaser consenting to the form of order) an “inquiry what was the difference between the value of the interest so represented as proposed for sale, and the interest in the said lease, and if the Master shall find that he is unable to ascertain such difference in value, or if the purchaser shall declare himself content to take such interest as can be given him with an indemnity, the Master to settle such security by way of indemnity as it should appear just that the vendor should execute.” Inquiry.

In *Halsey v. Grant*, 1806, 13 Ves. 73 (see p. 81), it was referred to the Master to inquire whether there ought to be any, and what, indemnity in respect of a fee-farm rent of 19*l.* 6*s.* 0*d.* issuing out of a rectory, the tithes of which were being sold. The Master thought no indemnity was necessary : Reg. Lib. 1806, A. 251.

In *Horniblow v. Shirley*, 1806, 13 Ves. 81 (see p. 83), it was referred to the Master to set a value on the incumbrances or outgoing, or ascertain what might be a proper indemnity against the same.

In *Wilson v. Williams*, 1857, 3 Jur. N. S. 810, where the vendor's wife was prospectively entitled to dower if she survived him, and the vendor was unable to procure her concurrence in the sale, the Court directed that a sufficient portion of the Dower.

purchase money should be set aside and retained in Court and invested, and that the vendor should receive the interest thereon during the joint lives of himself and his wife, and that the interest should be paid to her during her life if she survived her husband (in satisfaction of her dower), and the principal upon her decease should go to the vendor. It may be remarked on that case that the wife was not bound by the decree, that if the land increased in value the interest on the fund in Court might not have satisfied her claim to dower, and that the chance of the vendor's wife having dower, and the probable duration of such dower, could have been calculated by an actuary. See p. 113.

Is an indemnity compulsory on vendor?

In *Balmanno v. Lumley*, 1813, 1 Ves. & B. 224, Lord Eldon thought the Court could not compel the vendor to give an indemnity.

In *Aylett v. Ashton*, 1835, 1 My. & Cr. at p. 114, Pepys, M. R., held that the Court could not compel the vendor to give an indemnity, following the authority of Lord Eldon in *Balmanno v. Lumley*, *ubi sup.*, and *Paton v. Brebner*, 1819, 1 Bli. 66.

In *Powell v. South Wales Ry. Co.*, 1855, 1 Jur. N. S. 773, the vendor was compelled to give compensation as well as an indemnity. There the land sold contained $3\frac{1}{2}$ acres, and was part of an estate of 122 acres, the whole of which was subject to a rent-charge of 20*l.* per annum, which the vendor had not disclosed. In answer to the inquiry as to the amount of compensation, the Master found that the proper compensation would be to deduct from the purchase money (1,700*l.*) such an amount as should bear to the value of the rent charge (which he assessed at 500*l.*) the same proportion as the $3\frac{1}{2}$ acres bore to the whole estate of 122 acres—viz. 12*l.* 14*s.* 8*d.* Wood, V.-C., ordered 12*l.* 10*s.* to be deducted for compensation, and further directed the vendor to execute a conveyance of the property, and therein to covenant for himself, his heirs and assigns, to pay the annuity of 20*l.*, and that whilst the annuity should subsist the same should, as between the vendor, his heirs and assigns, and the company and their successors, be chargeable upon the 119 acres remaining in his possession in exoneration of the lands so conveyed. But if the vendor paid the whole annuity, there seems to be no reason why he should pay any compensation.

In *Bainbridge v. Kinnaird*, 1863, 32 Beav. 316, where the land sold was subject, together with other estates having a rent roll of 20,000*l.* a year, to a charge of 15,000*l.* for portions, Lord Romilly held that the purchaser was not entitled either to compensation or indemnity.

If compensation can be fairly assessed, and the purchaser prefers compensation to an indemnity, the Court will decree compensation instead of the execution of an indemnity, because compensation is fairer to the purchaser.

Purchaser may choose compensation.

“ If the estate was purchased subject to a contingency affecting its immediate value, he (the purchaser) could not carry it to market. Property held subject to the question of indemnity remains unsaleable, unmarketable, and of infinitely less value than it would otherwise be ” : per Lord Eldon in *Milligan v. Cooke*, 1808, 16 Ves. 1.

If compensation cannot be assessed the purchaser cannot be compelled to take an indemnity : *Ridgway v. Gry*, 1849, 1 Mac. & G. 109 ; *Nouaille v. Flight*, 1844, 7 Beav. at p. 527.

Purchaser cannot be forced to take indemnity.

The purchaser cannot be forced to take an indemnity against the risk of being dispossessed of the property. Thus, where the sub-lessee of a house which was included with five others in a head-lease, and subject to general covenants and a power for re-entry, the intending lessee was not compelled to complete with an indemnity : *Fildes v. Hooker*, 1818, 3 Mad. 193.

The liability of the purchaser of leasehold houses held under a lease, which contained covenants to build thirty-four additional houses (as yet unbuilt), to keep in repair the houses built and to be built, and to deliver them up at the end of the term, is a liability which is not a fit subject for indemnity : *Nouaille v. Flight*, 1844, 7 Beav. 521.

In *Wood v. Bernal*, 1812, 19 Ves. 220, Lord Eldon seems to have thought that a purchaser might be compelled to take an indemnity for a small incumbrance upon a considerable estate ; but not where the incumbrance amounted to half the purchase money. This was, however, mere *dictum*. In *Halsey v. Grant*, 1803, 13 Ves. 73, where the Court ordered the purchaser to complete with an indemnity if necessary, no indemnity was in fact given.

CHAPTER XIV

RECOVERY OF DEPOSIT

WHERE the vendor has made an essential misdescription, or his title is defective in an essential matter, then, in the absence of stipulations to the contrary, the purchaser is entitled to have the contract rescinded by the Court, and to recover his deposit. See above, pp. 78 to 94, as to what is "essential." If the title is not defective, but merely too doubtful to force on the purchaser, it would seem to be the better opinion that in the absence of misrepresentation the purchaser cannot recover his deposit : *Nottingham, &c. v. Butler*, 1886, 16 Q. B. D. at pp. 778, 787, 789 (discussed below, Chap. XXI. at p. 187). With regard to stipulations binding the purchaser to accept a defective title it will be seen below (Chap. XXI. at p. 214) that in many cases the stipulation may be effective to preclude the purchaser from recovering his deposit, but not to enable the vendor to get specific performance.

Interest.

Where the deposit is ordered to be returned, the Court orders payment of interest thereon at the rate of 4*l.* per cent. : *Hargreaves and Thompson*, 1886, 32 Ch. D. 454. It is, however, possible that if the present low rate of interest on safe investments continues, the Court may, in future, order interest at a lower rate than 4*l.* per cent. : see *Re Goodenough*, (1895) 2 Ch. 537 ; and *Re Cleveland's Estate*, *ibid.* 542.

It is not clear on the cases whether the same rule applies to a deposit paid into Court on a sale by the Court. In *Re Arnold*, 1880, 14 Ch. D. 270, interest at 4*l.* per cent. was allowed to the purchaser ; it does not appear whether the deposit had been invested or not. In *Lachlan v. Reynolds* 1853, Kay, 52, no interest was allowed on a deposit of 95*l.* paid into Court, on

the ground that the deposit had not been invested and had borne no interest. In *Powell v. Powell*, 1875, 19 Eq. 422, the purchaser was held entitled to the securities on which his deposit had been invested and the dividends which had accrued thereon, not in the shape of interest, but on the ground that it was his own money, and that he was entitled to whatever it had produced. In the converse case of a purchaser who *completes* under a sale by the Court, the securities on which the deposit is invested and the dividends thereon belong to the vendor as part of the purchase money, and the purchaser is entitled, on paying in the balance of the purchase money, to deduct the deposit and interest thereon at 4l. per cent. instead of deducting the present value of the securities and the dividends which have accrued : *D'Oyley v. Powis*, 1786, 1 Cox, 206.

Even though the conditions of sale bind the purchaser to pay interest at 5l. per cent. in case of delay in completion, the Court will only allow the purchaser interest on the deposit at the rate of 4l. per cent. : *Re Arnold*, 1880, 14 Ch. D. at p. 285.

Where the purchaser is charged with an occupation rent, interest at 4l. per cent. on the deposit will be allowed and set off against such rent : *Smith v. Jackson*, 1816, 1 Mad. 618.

The Court will declare the purchaser entitled to a lien for the deposit and interest : *Torrance v. Bolton*, 1872, 8 Ch. 118 (purchaser's action for rescission) ; *Turner v. Marriott*, 1867, 3 Eq. 744 (vendor's action for specific performance) ; *Westmacott v. Robins*, 1861, 4 D. F. & J. (purchaser's action for specific performance with compensation) ; *New Land &c. and Gray*, (1892) 2 Ch. 138 (purchaser's summons) ; *Higgins and Percival*, 1888, 59 L. T. 213 (vendor's summons). The purchaser is entitled to a lien for his deposit both where the contract goes off for want of title and where the contract is rescinded under a condition enabling the purchaser to rescind : *Whitbread v. Watt*, (1902) 1 Ch. 835. Lien.

Where the vendor is not the absolute beneficial owner (*e.g.* where the vendor is a mortgagee selling under his power) the purchaser may not be entitled to a lien as against the person beneficially entitled (in that case the mortgagor) : *Wythes v. Lee*, 1855, 3 Drew. 396.

Procedure.

The purchaser may recover the deposit and interest :

(i) In an action for damages for the vendor's breach of contract : *Hodges v. Litchfield*, 1835, 1 Bing. N. C. 492.

(ii) In an action for rescission : *Torrance v. Bolton*, 1872, 8 Ch. 118.

(iii) In an action by the purchaser for specific performance with compensation, which fails merely on the ground that the amount of compensation cannot be assessed : *Westmacott v. Robins*, 1861, 4 D. F. & J. 390.

(iv) Probably, also, in an action by the purchaser for specific performance where the vendor could not make a good title ; though this, formerly, would not be done, as a Court of Equity dismissing a bill could make no order in favour of the plaintiff : *Aylett v. Ashton*, 1835, 5 L. J. Ch. 71 ; *Bennet College v. Carey*, 1791, 3 Bro. C. C. 390 ; but see, now, Judicature Act, 1873, s. 24, sub-s. 7.

(v) On a summons under the Vendor and Purchaser Act taken out by the purchaser, if the ground for relief is the vendor's failure to make a good title : *Hargreaves and Thompson*, 1886, 32 Ch. D. 454 ; *Ebsworth and Tidy*, 1889, 42 Ch. D. 23, 53. But not if the ground for relief is the vendor's misrepresentation (*Davis and Cavey*, 1888, 40 Ch. D. 601), because that is a question affecting the existence or validity of the contract, and therefore excluded by sect. 9 of the Vendor and Purchaser Act. However, in *Wallis and Barnard*, (1899) 2 Ch. at p. 520, Kekewich, J., said that mistake was not a question affecting the validity of the contract. "The contract is, and remains, valid until rescinded by the Court." And the Court has decided on a vendor and purchaser summons that a contract to grant a lease was a valid contract, the validity depending on the construction of the contract : *Lander and Bagley*, (1892) 3 Ch. 41.

(vi) On a summons under the Vendor and Purchaser Act taken out by the vendor, upon which the Court holds that the vendor cannot make a good title : *Higgins and Percival*, 1888, 59 L. T. 213 ; *Walker and Oakshott*, (1901) 2 Ch. 383.

(vii) In an action by the vendor for specific performance, which is dismissed on the ground of misrepresentation or defective title : *Turner v. Marriott*, 1867, 3 Eq. 714.

If the purchaser brings his action for the deposit in the form of an action for money had and received, then it would appear that he cannot recover interest unless he has first served a demand on the vendor under 3 & 4 Will. IV. c. 42, s. 28 : see *Frühling v. Schroeder*, 1835, 2 Bing. N. C. 77. But in such a case the purchaser might obtain leave to amend by claiming interest by way of damages.

If the purchaser has given a cheque for the amount of the deposit, any ground on which he could recover the deposit if paid in cash is a good ground of defence in an action upon the cheque : *Mills v. Oddy*, 1834, 6 Car. & P. 728. Cheque.

CHAPTER XV

DAMAGES

IF the vendor has made an essential misdescription or there is an essential defect in the title, the purchaser may recover damages unless he is precluded by the conditions of sale. The purchaser may also recover damages if the vendor refuses to complete.

Rule in
Bain v.
Fothergill.

The measure of the damages recoverable by the purchaser depends on the nature of the vendor's default. If the vendor wilfully refuses to complete or has acted fraudulently in the matter, the purchaser may, in addition to the expenses actually incurred by him, recover damages for the loss of bargain. As to what damages are recoverable under this head, see below, p. 133. But if the vendor's default consists merely of his inability to show a good title, or of his having by mistake or inadvertence misdescribed the property, the only damages recoverable by the purchaser will be the expenses of and incidental to the sale which have been properly incurred by him. As to what damages are recoverable under this head, see below, p. 134. On a sale of chattels the purchaser can recover damages for the loss of his bargain, even if there has been no fraud or wilful default on the vendor's part. The rule in the case of land is well settled, and was called the rule in *Flureau v. Thornhill*, 1776, 2 W. Bl. 1078; it is now called the rule in *Bain v. Fothergill*, 1874, L. R. 7 H. L. 158. See also *Walker v. Moore*, 1829, 10 B. & C. 416, and cases there cited; also *Pounsett v. Fuller*, 1856, 17 C. B. 660; and *Gas Lig't, &c. v. Towse*, 1887, 35 Ch. D. 519. The rule in *Bain v. Fothergill* is an anomalous rule based upon and justified by the difficulties experienced by vendors of real property in showing a good title: *Day v. Singleton*, (1899) 2 Ch. at p. 329.

There are some expressions in *Bain v. Fothergill*, 1874, L. R. 7 H. L. at p. 207, to the effect that the right to recover damages for loss of bargain is confined to the case of the vendor's fraud. But it is well settled that damages for loss of bargain may also be recovered in case of the vendor's wilful refusal to complete : *Engell v. Fitch*, 1869, L. R. 4 Q. B. 659 ; *Jaques v. Millar*, 1877, 6 Ch. D. 153 ; and *Day v. Singleton*, (1899) 2 Ch. 320. Wilful refusal.

In *Engell v. Fitch*, 1869, L. R. 4 Q. B. 659, mortgagees sold a house, stating that possession would be given on completion ; the mortgagor was in possession and the mortgagees could have got possession by evicting him, but refused to do so ; the purchaser, instead of suing for specific performance, brought an action for damages and recovered damages for the loss of his bargain.

In *Day v. Singleton*, (1899) 2 Ch. 320, leaseholds which could not be assigned without a licence from the lessor were sold "subject to the landlord's consent" ; the vendor did not endeavour to procure the lessor's licence, and it was held that the purchaser was entitled to damages for the loss of his bargain.

An attempt was made in the case of *Hopkins v. Grazebrook*, 1826, 6 B. & C. 31, to add a further exception to those of fraud and wilful default already mentioned—viz. that if the vendor at the time of entering into the contract was not in possession of the land, and, having merely contracted to purchase the land himself, did not know whether he had a title or not, the purchaser can recover damages for the loss of his bargain. In that case the vendor sold property which he had contracted to purchase, but which had not been conveyed to him, nor had he examined the title. It turned out that *his* vendor had no title, and the purchaser was allowed damages for the loss of his bargain. This case was, however, overruled by *Bain v. Fothergill*, 1874, L. R. 7 H. L. 158, see pp. 206, 207, 212.

It has also been said that the rule in *Bain v. Fothergill* has nothing to do with sales by the Court : per Kekewich, J., in *Hollivell v. Seacombe*, (1906) 1 Ch. p. 430. The Judge did not, however, mean that the purchaser could recover damages for loss of bargain, but that he was entitled to be recouped all the expenses he had incurred.

In *Robinson v. Harman*, 1 Ex. 850, a tenant for life without power of leasing agreed to grant a lease, and assured the lessee that he had power to do so, well knowing that he had no such power. The lessee was allowed damages for the loss of his bargain. But here the lessor acted fraudulently, and the case came within the exceptions already established.

The rule in *Flureau v. Thornhill* was held not to apply in the case of a very special agreement, under which the defendants were to grant the use of an entrance to the plaintiff in consideration of a surrender of other leasehold premises by the plaintiff to the defendants. It appeared on the face of the agreement that the defendants had not yet got any title, and that no abstract of title was to be waited for, but that the plaintiff was forthwith to execute his part of the agreement, and that the plaintiff, having executed his part, could not be afterwards restored to his original position. The plaintiff was allowed damages for the loss of his bargain: *Wall v. City of London Real Property Co.*, 1874, L. R. 9 Q. B. 249.

Representa-
tion as to
agency.

Damages for loss of bargain are recoverable by the purchaser in an action for breach of a warranty by the defendant that he had authority to contract for the sale on behalf of the owner: *Collen v. Wright*, 1857, 8 E. & B. 647 (approved in *Salvesen v. Rederi, &c.*, (1905) A. C. 302); *Spedding v. Nevell*, 1869, L. R. 4 C. P. 212; *Godwin v. Francis*, 1870, L. R. 5 C. P. 295 (cf. *Re National Coffee Palace Co.*, 1883, 24 Ch. D. 367; and *Meek v. Wendt*, 1888, 21 Q. B. D. 126). The authority of these cases is not affected by *Bain v. Fothergill*. The reason for the rule in *Bain v. Fothergill* is that an owner of land may quite excusably be ignorant of his title. But a person holding himself out as agent ought to know whether he has the authority which he pretends to have.

If the agent does not actually contract to sell, but, by his representation that he is authorised to sell induces the intending purchaser to incur expense, he would probably be held liable to the purchaser, at any rate to the extent of the expenses reasonably incurred by the purchaser. It is well established that the principle of *Collen v. Wright* is not confined to a case where a contract is entered into: *Starkey v. Bank of England*, (1903) A. C. 114.

The rule in *Bain v. Fothergill* applies also where damages are claimed in respect of the vendor's delay. If the delay is caused merely by the state of the vendor's title, the purchaser cannot obtain damages for the loss of any profits which he might have made had the vendor been ready to complete on the day fixed ; but if the vendor's delay is wilful, or if the delay is caused by the vendor's wilful refusal to complete, damages will be given for the loss of profits. See the cases of *Jaques v. Millar*, 1877, 6 Ch. D. 153 ; *Rowe v. London School Board*, 1887, 36 Ch. D. 619, and others stated below in the chapter on Conditions relating to Completion, Chap. XXIII. at p. 335.

If the vendor has acted fraudulently the purchaser may recover damages for the loss of his bargain, even after the completion of the contract.

The measure of damages for the loss of the bargain is *primâ facie* the difference between the contract price and the market price at the time of the breach of the contract—i.e. at the time fixed for completion.

Measure of damages for loss of bargain.

In the absence of other evidence, the price at which the purchaser bargains to re-sell is taken to be the market price at the time fixed for completion : *Engell v. Fitch*, 1869, L. R. 4 Q. B. 659.

In the absence of this and other evidence, the price at which the vendor afterwards sells the property is taken to be the market price at the time of the breach : *Godwin v. Francis*, 1870, L. R. 5 C. P. 295.

In the case of a breach of contract to grant a lease, the measure of the damages for the loss of the bargain would seem to be the capitalised amount of the difference between the annual value of the land to be demised (of which the rent afterwards obtained is *primâ facie* evidence) and the rent to be reserved by the lease : *Spedding v. Nevell*, 1869, L. R. 4 C. P. 212.

In the case of a breach of contract to accept a lease, the damages are the difference between the rent agreed on and the rent which the plaintiff can obtain from another tenant (the difference to be capitalised) : *Ex parte Llynvi Coal and Iron Co.*, 1871, 7 Ch. 28.

The measure of damages for the vendor's breach of his contract to give possession at a certain date will be, in the case of a house which the purchaser has actually agreed to let to a tenant, the amount of the rent which the purchaser would have received from the tenant for the period during which the purchaser is kept out of possession: *Royal Bristol, &c. v. Bomash*, 1887, 35 Ch. D. 390. In the case of a shop which the purchaser (or lessee) intends to occupy for trade the damages for a delay of fifteen weeks were assessed by Fry, J., at the sum of 250*l.*, the estimated amount of profits which the lessee would have made during that time: *Jaques v. Millar*, 1877, 6 Ch. D. 153.

Sub-sale.

It has been held that the expenses incurred by a purchaser in connection with a sub-sale are not recoverable even in cases where damages for the loss of bargain are recoverable, unless it can be taken to have been in the contemplation of the parties at the time of the agreement that a re-sale should take place—*i.e.* take place before the completion of the original purchase: *Spedding v. Nevell*, 1869, L. R. 4 C. P. 212 (a case of an agreement for a lease). But in *Hart v. Swain*, 1877, 7 Ch. D. 42, where the purchaser claimed the costs of an attempted re-sale by him, the Court directed an account of “the expenses incurred by the purchaser in consequence of the purchase of the land,” apparently intending to include these costs.

Nor can the purchaser recover, as damages for loss of bargain, the loss incurred by him on the re-sale of horses &c. which he had bought to stock the land with, before taking possession or investigating the title, and without giving notice to the vendor: *Godwin v. Francis*, 1870, L. R. 5 C. P. 295.

Expenses
recoverable.

The damages recoverable by the purchaser as the expenses of and incidental to the sale include (in addition to the recovery of the deposit with interest):

(1) Interest on the purchase money, if reasonably kept unemployed pending the completion of the contract (*Sherry v. Oke*, 1835, 3 Dowl. at p. 361), or interest paid by the purchaser on money borrowed by him to complete the purchase and kept unemployed: *Ibid.* But the purchaser cannot recover interest on his purchase money for a period beyond that fixed for completion, if time is of the essence of the contract, because in such

a case the purchaser can rescind on the date fixed for completion : *Metcalfe v. Fowler*, 1840, 6 M. & W. 830. In *Hanslip v. Padwick*, 1850, 5 Ex. 615, no interest was allowed on the purchase money borrowed by the purchaser. It does not appear when the money was borrowed, but it seems as if the Court considered that the contract was that a good title should be shown on the 11th October, and the purchase money paid on the 29th November, that time was of the essence of the contract, and that, if the purchaser raised the money before the 11th October, it was only his own imprudence that caused the loss, as he should not have begun to act before he had ascertained whether the vendor could or could not complete his contract.

(2) The expense of preparing, stamping, and entering into the agreement (*Hanslip v. Padwick*, 1850, 5 Ex. 615), but not the expenses incurred by the purchaser previously to entering into the contract (*Hodges v. Litchfield*, 1835, 1 Bing. N. C. 492 ; *Schreiber v. Dinkel*, 1886, 54 L. T. 911), or, in the case of a lessee with option of purchase, the expenses of improving the land before exercising the option or examining the title (*Worthington v. Warrington*, 1849, 8 C. B. 134). On a sale by the Court, if the purchaser is entitled to rescind, the damages recoverable include the costs occasioned by his bidding for and becoming the purchaser of the property : *Holliwell v. Seacombe*, (1906) 1 Ch. 426.

(3) The expense of verifying the abstract (*Hodges v. Litchfield*, 1835, 1 Bing. N. C. 492), searching for judgments (*ibid.*), investigating and endeavouring to clear up the title (*Walker v. Moore*, 1829, 10 B. & C. 416) and making journeys for that purpose (*Hodges v. Litchfield*, *ubi sup.*), but not the expense of a survey made by him before examining the title (*ibid.*) nor the expense of raising the purchase money (*Hanslip v. Padwick*, 1850, 5 Ex. 615), nor loss through selling out stock (*Flureau v. Thornhill*, 1776, 2 W. Bl. 1078), nor the expense of forming and registering a company for the purpose of carrying on certain works on the land (*Hanslip v. Padwick*, *ubi sup.*).

(4) The expense of preparing the conveyance : *Hodges v. Litchfield* (1835, 1 Bing. N. C. 492), but not the expense of a conveyance drawn before the examination of a title which afterwards proves defective (*ibid.*) nor the expense of preparing

a conveyance after the discovery of a defect in the title : *Pounsett v. Fuller*, 1856, 17 C. B. 660. And if the purchaser prepares his conveyance before the title deeds are produced he cannot recover this expense if he afterwards rescinds because of the non-production of the title deeds (*Jarmain v. Egelstone*, 1831, 5 Car. & P. 172), although the conveyance was prepared in reliance on a note written in the margin of the abstract by the vendor's solicitor, stating that if it should be required they would apply to the solicitor for the original seller, in whose custody the title deeds were : *Ibid.*

The purchaser need not show that he has paid, but merely that he is liable for such expenses : *Richardson v. Chason*, 1847, 10 Q. B. 756.

The purchaser is not entitled to recover as his expenses, expenses incurred in further negotiations after the defect in title was discovered (*Sikes v. Wild*, 1863, 4 B. & S. 421), or further endeavours to carry out the contract (*Pounsett v. Fuller*, 1856, 17 C. B. 660; but see p. 678), or the costs of an abortive sub-sale (*Walker v. Moore*, 10 B. & C. 416), or costs incurred by him in defending an action for specific performance brought by the vendor and dismissed without costs (*Gray v. Fowler*, 1873, L. R. 8 Ex. 249), or the difference between the party and party costs and the solicitor and client costs incurred by the purchaser in an action for specific performance brought by the vendor and dismissed with costs (*Hodges v. Litchfield*, 1835, 1 Bing. N. C. 492), or the costs of an action for specific performance brought by the purchaser and dismissed without costs on the ground of a defect in the vendor's title known to the purchaser before he brought his action (*Malden v. Fyson*, 1847, 11 Q. B. 292).

Procedure

Originally a purchaser who wished to recover damages had to bring an action at common law, in which, instead of rescinding, he affirmed the contract, and claimed damages for the vendor's breach thereof. The Courts of equity either had no jurisdiction to award damages, or refused to exercise it. See *Guillim v. Stone*, 1807, 14 Ves. 128, and *Sainsbury v. Jones*, 1839, 5 My. & Cr. 1. Damages for a fraudulent misrepresentation could only be recovered in a common-law action of deceit : see below, p. 138.

Lord Cairns' Act (21 & 22 Vict. c. 27), which empowered the Court of Chancery in its discretion to award damages, either in addition to, or in substitution for, specific performance, in all cases where the Court had jurisdiction to decree specific performance, applied only to cases where the person asking for damages claimed, and was entitled to, specific performance, and did not enable the Court of Chancery to award damages in an action of rescission, or where the Court had no jurisdiction to decree specific performance, or where it was impossible to give specific performance: *Ferguson v. Wilson*, 1866, 2 Ch. 77; *Lavery v. Purssell*, 1888, 39 Ch. D. 508. The jurisdiction which Lord Cairns' Act conferred still subsists, notwithstanding the repeal of that Act effected by the Act of 46 & 47 Vict. c. 49. See sect. 5 of the latter Act, and *Sayers v. Collyer*, 1884, 28 Ch. D. 103; and *Chapman v. Auckland Union* 1889, 23 Q. B. D. 294.

The effect of the Judicature Act, 1873, s. 24 (7), is to give the Chancery Division the same jurisdiction to award damages as was exercised by the Courts of common law, so that damages may now be awarded in the Chancery Division, even in cases where the Court has no jurisdiction to decree specific performance: per Cotton and Fry, L.JJ., in *Proctor v. Bayley*, 1889, 42 Ch. D. 390 (a case of injunction). Under its new jurisdiction, the Chancery Division may award damages in an action for specific performance by the purchaser, although specific performance is impossible (*Pearl Life, &c. v. Buttenshaw*, (1893) W. N. 123), and although the purchaser has not asked for damages in his writ or statement of claim: *Ibid.* Where a Court of common law would have awarded damages for loss of bargain, as in the case of the vendor wilfully refusing to complete, the Chancery Division will grant the same relief: *Jaques v. Mil'ar*, 1877, 6 Ch. D. 153 (where the purchaser got a decree for specific performance, and also damages for the period during which the vendor had kept the purchaser's business at a standstill by refusing to complete). The Chancery Division has no wider jurisdiction to award damages than that exercised by the old Courts of common law: *Lavery v. Purssell*, 1888, 39 Ch. D. 508. If, owing to the Statute of Frauds not having been complied with, a Court of common law would not have granted damages, then, although on the principle of part performance a Court of

Equity might have granted specific performance, yet if for some other reason specific performance is refused the Chancery Division will not, in exercising the common-law jurisdiction of granting damages, apply the equity rule of part performance, but will in regard to damages act on common-law principles throughout : *Ibid.*

Vendor and
purchaser
summons.

The purchaser may also recover damages—*i.e.* the costs of investigating title, but not damages for the loss of his bargain, on a vendor and purchaser summons (*Hargreaves and Thompson*, 1886, 32 Ch. D. 454), even though the summons has been taken out by the vendor : *Higgins and Percival*, 1888, 59 L. T. 213. Damages for delay are not recoverable on a vendor and purchaser summons, as these are in the nature of damages for the loss of the bargain. *Wilsons and Stevens*, 1894) 3 Ch. 546.

Where the ground for relief is the vendor's misrepresentation, and not a mere defect in his title, it has been held that such a case is within the exception in sect. 9 of the Vendor and Purchaser Act, 1872, "a question affecting the existence or validity of the contract," and the Court has refused to order the return of the deposit and payment of the purchaser's costs of investigating title : *Davis and Cavey*, 1888, 40 Ch. D. 601. See further p. 128, above.

In order to obtain damages for the vendor's fraud, the purchaser must allege fraud in the pleadings : *Redgrave v. Hurd*, 1881, 20 Ch. D. at p. 12. This is a survival of the old rule, that the vendor's fraud would entitle the purchaser to recover damages for the loss of his bargain only in an action of deceit. See remarks in *Sikes v. Wild*, 1863, 1 B. & S. 594, approved by Lord Chelmsford in *Bain v. Fothergill*, 1874, L. R. 7 H. L. at p. 206.

Inquiry.

When damages are awarded, either an inquiry in chambers is directed as to the amount, or damages are assessed by the Judge at the trial of the action : *Jaques v. M'Ilar*, 1877, 6 Ch. D. 153.

Lien.

The Court will declare the purchaser entitled to a lien for his costs of investigating title, whether on a vendor and purchaser summons (*Yeilding and Westbrook*, 1886, 31 Ch. D. 344 ; *Higgins and Percival*, 1888, 59 L. T. 213), or in an action by the vendor for specific performance (*Kitton v. Hewett*, (1904) W. N. 21). See above, p. 127, as to lien for deposit.

CHAPTER XVI

RELIEF IN CASE OF PAROL VARIATION

By the Statute of Frauds, s. 4, contracts affecting land must be in writing. By a general rule of law, even independently of the Statute of Frauds, when a contract has been reduced to writing parol evidence is inadmissible to contradict, vary, or add to its terms, but is admissible for the purpose of proving fraud, misrepresentation, mistake, or any other fact which has any effect on the validity of the written contract, or the rights of either party to enforce it, or have it cancelled, rectified, or rescinded.

The rules as to the admission of parol evidence may conveniently be classified under the headings of the legal remedies of the vendor and purchaser respectively.

First, as to specific performance :

(1) The vendor cannot enforce specific performance of the contract *with* a parol variation if the purchaser refuses to have the variation read into the contract : *Higginson v. Clowes*, 1808, 15 Ves. 516 ; and *Jenkinson v. Pepys*, cited *ibid.* p. 521. See, also, *Manser v. Back*, 1848, 6 Ha. at p. 447 ; and *Caballero v. Henty*, 1874, 9 Ch. 447. The case of *Pember v. Mathers*, 1779, 1 Bro. C. C. 52, taking the contrary view, was commented on in *Clarke v. Grant*, 1808, 14 Ves. at p. 525. As to the admissibility of evidence of a verbal statement correcting a misdescription in the written contract, or informing the purchaser as to the sort of title he would get, see p. 140, below.

(1) Vendor asking for sp. perf. with variation.

The rule holds good notwithstanding the purchaser may have signed a written agreement referring to the verbal variation. Thus, in *Higginson v. Clowes* (*ult. sup.*), the defendant had

bound himself to "a strict fulfilment of this article, and to abide by the conditions and declarations made at this sale."

In *Higginson v. Clowes* (*ubi sup.*) the parol variation was the introduction of a clause binding the purchaser to pay for timber at a valuation, where from the contract the purchaser inferred that the timber was included in the lot purchased by him. In *Manser v. Back* (*ubi sup.*) the parol variation was the stipulation that a right of way should be reserved to the vendor.

The rule above stated is also applicable to the case of an agreement for a lease. Thus, the lessor suing for specific performance may not adduce evidence of a parol agreement to exclude from the lease part of the land comprised in the written agreement: *Lawson v. Laude*, 1761, Dickens, 346; *Townshend v. Stangroom*, 1801, 6 Ves. 328.

Verbal
statement
correcting
misdescription.

A distinction is to be drawn between a parol variation of the contract and a parol statement correcting a misdescription. Evidence of a parol statement made by the vendor or his agent may be adduced for the purpose of proving that the purchaser did not rely on, or was not deceived by, the description contained in the written contract: *Farebrother v. Gibson*, 1857, 1 De G. & J. 602. There the particulars described the property as "in the occupation of the C. L. Company under a lease." The company were in occupation by virtue of a lease granted to A., B., and C., their trustees. The purchaser was verbally informed by the vendor's solicitor before the sale that A. and B. were the names of two of the lessees. After the sale the purchaser refused to complete, on the ground that he had understood from the particulars that the lease was to the company itself. In an interpleader suit by the auctioneer, which by consent was treated as a suit by the vendor for specific performance, evidence of this verbal statement was admitted on behalf of the vendor, and the purchaser was held to his bargain.

So, too, in *Swaishand v. Dearsley*, 1861, 29 Beav. 430, where, on a sale in lots, one lot was described as "an undivided moiety" of freehold land with the statement "the apportioned rent of this lot is 16*l.* per annum," evidence was admitted of verbal statements by the auctioneer explaining the ambiguity

as to the rent. The vendor, however, lost his action because the statements were not heard by the purchaser, or, if heard, were not understood.

The distinction between a parol variation of a contract and parol evidence to prove that the purchaser has not been deceived may be illustrated by reference to a case of acreage. Thus, on the sale of an estate of 400 acres, evidence of a verbal agreement, that a close of 4 acres should be excluded from the sale, would be inadmissible in an action by the vendor for specific performance (*Townshend v. Stangroom*, 1801, 6 Ves. 328); but the auctioneer's statement, that the land had been re-surveyed and was found to be 4 acres short, would be admissible in order to prove that the purchaser was not deceived by the written description, and the vendor would be entitled to specific performance without giving compensation. The former is a "parol variation"; the latter is only a verbal statement correcting a misdescription.

A distinction is also to be drawn between a parol variation of the contract and a parol statement made by the vendor or his agent as to some matter of title as to which the contract was silent or ambiguous. Thus, where the vendor, having only a leasehold, sold by the description "my house," evidence was adduced that the purchaser had read some conditions of sale (not incorporated in the contract) which informed him that the vendor had only a lease: *Cowley v. Watts*, 1853, 17 Jur. 172.

So, too, the ambiguous description "lease" in the contract may be corrected by the vendor's verbal statement that he has an under-lease: see above, p. 41. And compare the rule mentioned below, p. 147, as to the admission of similar evidence in actions of rescission or damages.

The case which goes furthest in the admission of evidence as to the purchaser's knowledge of the vendor's title is *Ogilvie v. Foljambe*, 1817, 3 Mer. 53. There, on the sale of leasehold property, evidence was admitted that the purchaser had read some conditions (not incorporated in the contract), one of which stipulated that the lessor's title should not be called for. The *ratio decidendi* of that case (*ibid.* p. 64) was that this was a declaration (*i.e.* of a fact) that it was matter of notice and not

of contract. In other words, the purchaser knew beforehand what title the vendor could give him. But even assuming that the right to a good title is not a contractual right, but a collateral right given by law (which is not settled: see *Ellis v. Rogers*, 1885, 29 Ch. D. at p. 671), the statement as to the lessor's title, or any other statement cutting down the purchaser's right to a good title, would appear to be not a statement of fact, but a stipulation, which, if not incorporated in the written contract, would be a "parol variation" within the above rule. Cf. *Goss v. Nugent*, 1833, 5 B. & Ad. 58.

The rule that the vendor cannot enforce specific performance *with* a parol variation is too firmly settled to be upset by the criticisms which Mr. Cyprian Williams directs against it in "Vendor and Purchaser," pp. 697 *et seqq.* It may be quite correct to say that, where the vendor makes out a proper case for rectification, he can in the same action obtain rectification of the agreement and specific performance of the agreement so rectified; also, that the Statute of Frauds is not a defence to an action of rectification. But in the class of cases under consideration the vendor could not successfully claim rectification. In an action for rectification of a written contract on the ground of mistake, it is not enough to show that the document does not express the true intent of the parties: it must also be shown either that a mistake was made in reducing the contract to writing, or that the person seeking rectification made a mistake as to the contents of the document signed by him. Cases like *Olley v. Fisher*, 1886, 34 Ch. D. 367, are to be regarded either as the correction of a slip or as instances of mistake as to the contents of the instrument. If the vendor, after preparing particulars and conditions of sale (or even a less formal contract of sale), introduces a new term by way of parol, and neglects to alter the written contract, there is in such a case no mistake, and therefore no reason why he should obtain rectification. If, indeed, he alters some copies of the particulars and conditions in writing, and then, through inadvertence, signs and obtains the purchaser's signature to an unaltered copy, this would be a good ground for rectification. But the reason for decreeing rectification in such a case is not the bare fact that

the written agreement does not express the intention of the parties, but that the parties by mistake have signed the wrong document.

(2) The vendor cannot enforce specific performance of the contract *without* the parol variation, if the purchaser insists upon having the variation read into the agreement.

(2) Vendor asking sp. perf. *without* variation.

Thus, on an agreement for a lease of wine vaults, the non-fulfilment by the lessor of a verbal agreement to make the vaults dry was held sufficient to entitle the lessee to resist specific performance : *Lamare v. Dixon*, 1873, L. R. 6 H. L. 414. This case must be taken to have overruled *Phipps v. Child*, 1857, 3 Drew. 709, where Kindersley, V.-C., refused to import into an agreement for sale of a mine a parol agreement by the plaintiff to relieve the mine from flooding.

The parol variation may even consist of an undertaking by the vendor to do some act on other property not the subject of the sale. Thus specific performance was refused to a vendor who had not carried out a verbal undertaking to lay out streets and build a church on adjoining property : *Myers v. Watson*, 1851, 1 Sim. N. S. 523 (*sub nom.* *Rose v. Watson*, 10 H. L. (a. 672).

If the parol agreement did not induce the purchaser to buy, then it is treated as an independent agreement, and not as a parol variation of the contract of sale. The non-performance by the vendor of an independent agreement (even if reduced to writing and contained in the same instrument as the contract of sale) will not entitle the purchaser to resist specific performance of the contract of sale : see *Croome v. Lediard*, 1833, 2 My. & K. 251. In that case A. agreed to sell, and B. to buy, the L. estate, and by the same written contract B. agreed to sell, and A. to buy, the H. estate, and the contract did not expressly state that the two agreements were dependent on each other ; it was held, that A. was entitled to specific performance of his contract to sell the L. estate, although, owing to defective title, B. could not enforce the sale of the H. estate. In that case, evidence offered by the defendant that the two agreements were meant to be dependent on each other was excluded ; but the correctness of this course may be doubted, since, according to the principle of *Lamare v. Dixon, ubi sup.*, even if the

agreement to sell the L. estate had been by parol, the purchaser, as defendant in an action of specific performance, could have proved this agreement, and have proved that it was part of the contract between the parties. Moreover, it might reasonably have been inferred from the fact of the two agreements being contained in the same document that they were meant to be mutually interdependent, and that the transaction really amounted to an agreement for an exchange.

In *Vouillon v. States*, 1856, 25 L. J. Ch. 875, the vendor obtained specific performance *without* a parol variation set up by the purchaser, on the ground either that the parol variation was not part of the contract or a condition to its performance, or that the parol variation was not explicit, or that part performance had made it inequitable for the purchaser to refuse to complete.

(3) Purchaser asking sp. perf. *with* variation.

(3) The purchaser cannot enforce specific performance *with* the parol variation if the vendor objects to the variation. See *Woollam v. Hearn*, 1802, 7 Ves. 211; and *Clowes v. Higginson*, 1813, 1 Ves. & B. 524. In the first of those cases, Grant, M. R., said, at p. 219: "If this had been a bill brought by this defendant (the lessor) for a specific performance, I should have been bound by the decisions to admit the parol evidence and to refuse a specific performance. But this evidence is offered not for the purpose of resisting, but of obtaining a decree: first, to falsify the written agreement, and then to substitute in its place a parol agreement to be executed by the Court."

A purchaser who is defendant in an action for specific performance brought by the vendor, may adduce parol evidence of an agreement to give compensation for the purpose of resisting specific performance, but not for the purpose of obtaining compensation, because in the latter case he would be virtually a plaintiff in a cross-action: *Winch v. Winchester*, 1812, 1 Ves. & B. at p. 378.

(4) Purchaser asking sp. perf. *without* variation.

(4) The purchaser cannot enforce specific performance *without* the variation, if the vendor insists upon having the variation read into the agreement: *Townshend v. Stangroom*, 1801, 6 Ves. 328, where Lord Eldon dismissed both a bill by the lessor for specific performance *with* a parol variation and a cross-bill by

the lessee for specific performance *without* the variation. See, too, *Manser v. Back*, 1848, 6 Ha. 443.

Cases like *Edwards to Daniel Sykes, &c.*, 1890, 62 L. T. 445, where evidence was adduced of the auctioneer's statement that the landlord paid the rates and taxes, to explain or correct the statement in the particulars that the "annual rental" was so much (giving the gross rental), are more correctly treated as illustrations of the rule (see above, p. 140) that parol evidence is admissible to show that the purchaser was not deceived.

(5) The plaintiff (whether he be vendor or purchaser) may, by allowing the defendant to elect whether the variation shall be inserted or not, enforce specific performance of the contract, *with* the variation if defendant desires it; if not, *without* the variation. See *Ramsbottom v. Gosden*, 1812, 1 Ves. & B. 165, at p. 169; *Donald v. Scott*, 1860, 10 Ir. Ch. R. 496; *Barnard v. Cive*, 26 Beav. 253; *Martin v. Pyecroft*, 1852, 2 D. M. & G. 785.

(5) Sp. perf.
giving
defendant
election.

But the plaintiff must assent to the defendant's view within a reasonable time. Thus, in *Legal v. Miller*, 1750, 2 Ves. sen. 299, after the defendant had succeeded in proving the parol variation, the plaintiff turned round and claimed, under his prayer for "general relief," specific performance of the contract so varied. The defendant was held entitled to resist this claim on the ground of surprise, and probably also of the expense incurred by the defendant, which would not have been incurred had the plaintiff adopted the parol variation at an earlier date. If the defendant does not state the parol variation in his defence, the plaintiff would probably be allowed to elect at the hearing: see *Smith v. Wheatcroft*, 1878, 9 Ch. D. 223.

Secondly, as to rescission, recovery of deposit, and damages.

If a verbal agreement has been entered into, or a verbal warranty given, which is merely collateral to and not inconsistent with the written agreement, and is not in itself such an agreement as by the Statute of Frauds is required to be in writing, either party is entitled to damages for a breach of that verbal agreement or warranty, provided he can convince the Court that the verbal agreement or warranty induced him to enter into the written contract, and that the written contract was

Verbal agree-
ment *not*
inconsistent
with written
contract.

not intended to contain the whole agreement between the parties. And the purchaser, instead of suing for damages for the breach of the verbal agreement, may sue for the rescission of the contract of sale and the recovery of his deposit and expenses.

Thus, damages have been given for the breach of a verbal undertaking to destroy rabbits, given by the landlord contemporaneously with a written agreement for a lease under which the landlord was to have an unrestricted right of shooting (*Morgan v. Griffith*, 1871, L. R. 6 Ex. 70); also for the breach of a verbal undertaking to kill down the game, and not to let the shooting (*Erskine v. Adeane*, 1873, 8 Ch. 756); also for the breach of a verbal undertaking to put a house in repair and send more furniture into it (*Angell v. Duke*, 1875, L. R. 10 Q. B. 174); and for the breach of a verbal warranty that the drains were in good order: *De Lassalle v. Guildford*, (1901) 2 K. B. 215.

The purchaser has recovered his deposit on the ground of the vendor's non-fulfilment of a verbal undertaking to lay out streets and build a church on other land: *Rose v. Watson*, 1864, 10 H. L. Ca. 672.

A sub-vendor, who has by a memorandum transferred the benefit of his contract to a sub-purchaser, is not prevented by the Statute of Frauds, or any rule of law, from proving that the memorandum did not contain the whole of the agreement between him and the sub-purchaser, the memorandum being intended for the use of the sub-purchaser in dealing with the original vendors, and not being intended to contain the terms of the agreement between him and the sub-vendor: *Jervis v. Berridge*, 1873, 8 Ch. 351. In that case, the sub-purchaser, who had refused to perform the agreement between himself and the sub-vendor, was not allowed to prevent the sub-vendor from completing his purchase from the original vendors.

Verbal
agreement
inconsistent
with written
contract.

If a verbal agreement has been entered into which is inconsistent with the written agreement it would appear (i) that the purchaser cannot recover his deposit or damages where the vendor refuses to complete *with* the parol variation which the

purehaser wishes to enforce, and conversely (ii) that the vendor cannot recover damages for the purchaser's refusal to complete *with* the parol variation which the vendor wishes to enforce. But it is not clear whether (iii) the purchaser can recover his deposit or damages if the vendor refuses to complete *without* the variation, or whether (iv) the vendor can recover damages for the purchaser's refusal to complete *without* the variation. In cases (i) and (ii) the plaintiff would be seeking to adduce oral evidence to vary a written contract, which is against the rules of equity and common law alike. But in cases (iii) and (iv), though at law the evidence would be inadmissible, yet in equity the parol variation would afford a good defence. If, therefore, such actions are now governed by the rules of equity, the evidence would be admissible.

A distinction must be drawn between cases of "parol variation" and the three following classes of case where parol evidence may be adduced in actions for breach of contract:

(1) The purchaser may prove a verbal misrepresentation and recover his deposit (*Redgrave v. Hurd*, 1881, 20 Ch. D. 1; *Mullens v. Miller*, 1882, 22 Ch. D. 194), together with interest (*Wauton v. Coppard*, (1899) 1 Ch. 92) and damages: see above, pp. 130 &c.

(2) The vendor may prove a verbal statement made by him correcting a misdescription in the written contract. In *Hare and O'More*, (1901) 1 Ch. 93, the vendor proved a verbal statement by the auctioneer correcting a misdescription in the particulars; the purchaser, it is true, recovered his deposit, but that was because he did not hear the correction and was therefore not undecieved. See, further, under the heading of specific performance, p. 140, above.

(3) The vendor may (whether in the purchaser's action of rescission or in the vendor's action for damages) prove that he informed the purchaser of an irremovable defect in his title. Thus, where the purchaser refused to complete his purchase of a leasehold house, on the ground that the lessor was entitled to re-enter for a continuing breach of covenant and would not waive his right of re entry, the vendor was allowed to prove that he had verbally informed the purchaser of this, and the vendor

recovered damages : *Clarke v. Coleman*, 1895, W. N. 114. See, further, under specific performance, p. 141, above.

Verbal Statement not heard by Purchaser

If the vendor or his agent (*e.g.* the auctioneer) makes a verbal statement which the purchaser does not hear, it is not clear whether the purchaser will be held to be affected by it. Apart from authority, it would seem that the purchaser's rights ought not to be altered by a verbal statement which did not reach the purchaser's ear, except that in cases of great hardship to the vendor specific performance ought not to be decreed on the footing of the statement not having been made.

In *Gunnis v. Erhart*, 1789, 1 H. Bl. 289, the vendors in an action on the case against the purchaser were nonsuited, and their application for a new trial failed, on the ground that their evidence of the auctioneer's verbal correction of a misstatement in the particulars had been rightly ruled out, in the absence of any proof that the purchaser had "particular personal information" given him.

In *Swaissland v. Dearsley*, 1861, 29 Beav. 430, the vendor's action for specific performance was dismissed, on the ground that the statement of the rent in the particulars was misleading, and that the auctioneer's verbal correction was not heard, or not understood, by the purchaser.

In *Manser v. Back*, 1848, 6 Ha. 443, where the auctioneer had verbally stated that a right of way would be reserved to the vendor, but the purchaser had not heard this statement, the purchaser's action for specific performance without that reservation was dismissed. This case was not, however, decided on the ground that the verbal statement was sufficient to alter the rights of the parties, whether the purchaser heard it or not; it was put on the ground that the auctioneer had no authority to sell without the reservation. But in the similar case of a misrepresentation by an agent, want of authority has been held to be immaterial : *Brett v. Clowser*, 1880, 5 C. P. D. at p. 386. The case might have been decided on the ground of mistake; several copies of the particulars had been altered, but the auctioneer inadvertently signed an unaltered copy.

In *Hare and O'More*, (1900) 1 Ch. 93, though the purchaser recovered his deposit on the ground of a misdescription in the particulars, a verbal correction of which by the auctioneer was not heard by the purchaser, yet it was also held (*ibid.* p. 94) on the authority of *Manser v. Back* that the purchaser could not obtain specific performance with compensation under a condition allowing compensation for errors. The latter part of the decision, and also the decision in *Manser v. Back*, might be supported on the ground of hardship. They illustrate the rule that specific performance is in the discretion of the Court.

If the purchaser is not present at the auction, but bids by means of an agent who hears the auctioneer's verbal statement correcting a misdescription in the particulars, it is not clear whether the purchaser is affected by what his agent hears. The purchaser is in fact not undeceived, as the auctioneer's statement never reaches him. The amount which he authorised his agent to bid was fixed in reliance on the particulars. It might also perhaps be said (cf. *Manser v. Back*, stated above; but *qu.* see *Brett v. Clowser* there mentioned) that the purchaser has not authorised the agent to buy according to the corrected description, and unless the corrected description is inserted in the written agreement the agent has not in fact bound the purchaser to take the property by its altered description. This appears to be the *ratio decidendi* of *Caballero v. Henty*, 1874, 9 Ch. 447. But in *Edwards to Daniel Sykes, &c.*, 1890, 62 L. T. 445, the vendor succeeded not only on the ground that there was no misdescription, but also on the ground that the misdescription (if any) was corrected by the auctioneer's statement made in the hearing of the purchaser's agent.

Subsequent Parol Variation

A *subsequent* parol variation (with the exception of stipulations as to time or title, or merely ancillary matters) will not be enforced, even in the negative method in which a prior or collateral parol variation can be enforced (*Price v. Dyer*, 1810, 17 Ves. 356). But rule (5), p. 145, applies here too—viz. that the plaintiff may enforce specific performance by agreeing to have the variation performed or not at the defendant's option :

Robinson v. Page, 1826, 3 Russ. 114. And a written contract, although it is one required to be in writing by the Statute of Frauds, may be altogether rescinded by a parol contract: *Ex parte Ilchester*, 1803, 7 Ves. at p. 377; *Price v. Dyer*, 1810, 17 Ves. 356; *Vezey v. Rashleigh*, (1904) 1 Ch. 634.

Snelling v. Thomas, 1874, 17 Eq. 303, exemplifies the rule above mentioned as to the refusal of the Court to enforce a subsequent parol variation. In that case there was an agreement in writing to take an under-lease containing the same covenants as those in the superior lease; the sub-lessee afterwards verbally approved of an under-lease containing a restrictive covenant which was not in the superior lease; it was held that the sub-lessor could not compel the sub-lessee to take an under-lease in the form verbally approved by him.

A parol variation relating to a purely ancillary matter is, however, effectual to alter the rights of the parties. For instance, the vendor's waiver of his right to rescind, or of his right to force the title on the purchaser because an objection is made too late, may, at any rate in equity, be effectually made by parol: Sug. 165. And the rule of equity would probably now be followed not only in actions for specific performance, but in actions for recovery of the deposit or for damages. As there may be some doubt on this subject, the former rules of common law in relation to these ancillary matters are appended here.

At law every part of a contract was considered essential: *Marshall v. Lynn*, 1840, 6 M. & W. at p. 117; secus *Leather, &c. v. Hieronymus*, 1875, L. R. 10 Q. B. 140 (change of route for the carriage of goods). In particular, time was always treated as essential. So an extension of time could not, at law, be effectually made by parol. And in *Stowell v. Robinson*, 1837, 3 Bing. N. C. 928, the purchaser recovered his deposit notwithstanding the vendor's defence that the time for completion had been extended by a verbal agreement. See, further, *Noble v. Ward*, 1867, L. R. 2 Ex. 135; and *Hickman v. Haynes*, 1875, L. R. 10 C. P. at p. 605. The law is now altered as to time being necessarily of the essence of the contract: see below, p. 309. So, probably, even at law, a parol variation may

now be successfully made in regard to time for completion, or time for sending in requisitions.

The vendor's title was at law treated as an essential matter. Thus, where the purchaser had, after the purchase, verbally agreed to waive a defect in title, it was held that, in the vendor's action for the purchase money, evidence of this waiver ought to have been excluded : *Goss v. Nugent*, 1833, 5 B. & Ad. 58.

CHAPTER XVII

RELIEF AFTER COMPLETION

Relief after
completion.

AFTER the purchase money has been paid to the vendor, and the conveyance has been executed, the purchaser will not, as a general rule, be entitled to relief for any misdescription, misrepresentation, or defect in title : *Wilde v. Gibson*, 1848, 1 H. L. Ca. at p. 632 ; *Brownlie v. Campbell*, 1880, 5 App. Ca. 936 ; *Clare v. Lamb*, 1875, L. R. 10 C. P. 334 ; *Brett v. Clowser*, 1880, 5 C. P. D. 376 ; *Joliffe v. Baker*, 1883, 11 Q. B. D. 255. The same rule applies to the sale of a chattel or of a chose in action : *Seddon v. North Eastern Salt, &c.*, (1905) 1 Ch. 326.

The exceptions to the rule are fraud, "common mistake," mistake as to the conveyance itself, express agreement contained either in the contract or in the conveyance, and the enforcement of a collateral agreement or warranty.

Even though the defect in title is not properly disclosed by the abstract, the purchaser will not after completion be entitled to relief : *McCulloch v. Gregory*, 1855, 1 K. & J. at p. 291.

Completion,
what.

Completion, in the above rule, means the execution of the conveyance, coupled with the payment of the purchase money. Even the taking of possession and payment of purchase money will not debar the purchaser of his right to rescind and recover the purchase money, provided the conveyance has not been executed : *Cripps v. Reade*, 1796, 6 T. R. 606 ; *Dalby v. Pullen*, 1829, 1 Russ. & My. 296 ; *Thomas v. Powell*, 1794, 2 Cox, 394, and *McCulloch v. Gregory*, 1855, 1 K. & J. at p. 291.

If the purchase money has not been paid to the vendor (as where it has been paid into Court, or part of it has been paid to the vendor and the remainder secured by the purchaser's bond), the purchaser is entitled, even after the conveyance has been

executed, to have any incumbrances which have been created by the vendor himself, or to which the covenants for title in the conveyance apply, paid off out of the purchase money : *Tourville v. Naish*, 1734, 3 P. W. 306 ; *Woods v. Martin*, 11 Ir. Ch. R. 148. In the latter case arrears for head rent due before the execution of the conveyance were paid off out of the unpaid purchase money secured by the bond of the purchaser.

In one case the purchaser was, after the execution of the conveyance, allowed compensation out of the purchase money in Court for a defect pointed out before completion : *Re Perriam*, 1883, 49 L. T. 710.

Where on the execution of the conveyance the purchase money (or part of it) is set apart as an indemnity, the purchaser's rights are kept alive and are not barred by the execution of the conveyance : *Crompton v. Melbourne*, 1832, 5 Sim. 353.

There land was wrongly described as tithe free, and upon completion part of the purchase money was set apart and invested to provide compensation in case the vicar of L. should turn out to be entitled to the tithes. It was afterwards discovered that the lands were in the S. parish, and that the rector of S. was entitled to them. It was held that the purchaser was entitled to compensation out of the money so set apart on the ground partly that the sale had not been completed, and partly that there were documents in the possession of the vendors which would have shown them that the rector of S. was entitled to tithes out of the land sold.

The law above stated applies equally to contracts to grant a lease ; thus, in the case of a contract to grant an under-lease, in the absence of stipulation, no compensation will be granted if, after the execution of the under-lease, it is discovered that the term granted by the lease was not so long as that granted by the under-lease : *Besley v. Besley*, 1878, 9 Ch. D. 103 ; *Clayton v. Leech*, 1889, 41 Ch. D. 103.

Grant of
lease.

If the contract has been induced by the vendor's fraud, then the purchaser can have the contract rescinded after completion : *Wilde v. Gibson*, 1848, 1 H. L. Ca. at p. 632. He can, in addition, recover his deposit and damages for the loss of his bargain. Thus in *Hart v. Swaine*, 1877, 7 Ch. D. 42, the purchaser

Fraud.

recovered the expenses of an attempted re-sale by him. The purchaser can, instead of rescinding, recover compensation for the misdescription, although there is no condition allowing compensation: *semble*, *Brett v. Clowser*, 1880, 5 C. P. D. 376; *Joliffe v. Baker*, 1883, 11 Q. B. D. 255.

Common
mistake.

Where a "common mistake" has been made, as where the purchaser buys what was already his own property, he can obtain relief even after completion: *Bingham v. Bingham*, 1748, 1 Ves. sen. 126. See further, as to common mistake, pp. 56 to 59 above.

Express
agreement.

The cases in which the purchaser has been relieved after completion under an express agreement contained in the contract are cases in which the contract has contained a condition for compensation which has been construed as applying to errors discovered after completion. See *Bos v. Helsham*, 1866, L. R. 2 Ex. 72, and other cases mentioned below, p. 291.

The cases in which the purchaser is entitled to relief under an express agreement contained in the conveyance—*i.e.* under the covenants for title—and also the cases in which the purchaser is relieved on the ground of mistake as to the conveyance itself, are beyond the scope of this book.

Warranty.

In the case of a purely collateral agreement which is held to have the force of a warranty, the purchaser may, it would seem, obtain relief notwithstanding the execution of the conveyance. It was so held in the case of a lease of a house, where the intending lessor, in order to induce the lessee to hand over the counterpart lease which he had signed, warranted that the drains were in good order: *De Lassalle v. Guildford*, (1901) 2 K. B. 215. It is, however, difficult to see why a parol statement that the drains are in good order should be treated as a warranty entitling the purchaser to relief after completion, but the same statement embodied in the written or printed particulars is treated as a misdescription for which no relief can be obtained after completion: see *Greswolde-Williams v. Barneby*, 1900, 83 L. T. 708. Moreover, in *Brett v. Clowser*, 1880, 5 C. P. D. 376 (which was not referred to in the judgment in *De Lassalle v. Guildford*), a verbal representation by the auctioneer that there was a right of way was not treated as a warranty, but compensation was refused on the

ground that, in the absence of a condition allowing compensation, no compensation could be given after completion. The case of *Palmer v. Johnson*, 1884, 13 Q. B. D. 351 (on which the Master of the Rolls relied in *De Lassalle v. Guildford*), was a case of an express agreement for compensation. In *De Lassalle v. Guildford* it is true that the lessee made an express point of the drains being in order, and refused to complete until he was assured on the point. But the purchaser who acts on a written statement as to the drains may be, and probably is, just as anxious on the point as the other purchaser who acts on a verbal assurance, and even a written statement may be "the basis" (using the words of Wills, J., quoted in *De Lassalle v. Guildford*) "of the contractual relations between the parties."

Ancillary Relief

If the sale is set aside after conveyance the purchaser will, Outgoings. in addition to having his purchase money repaid, be allowed all necessary outgoings, and also repairs and improvements executed by him before the discovery of the fraud or "common mistake," if asked for in the pleadings: *Edwards v. M'Leay*, 1815, 2 Swa. at p. 289. He will also be allowed his costs of the purchase, including costs of the conveyance (*ibid.*); and to interest at 4l. per cent. per annum upon such outgoings and costs. See form of decree in *Gibson v. D'Este*, 1843, 2 Y. & C. C. C. at p. 581.

On the other hand, the purchaser will have to account for the Rents. rents which he has received: *Gibson v. D'Este*, *ubi sup.* The account was taken there, it would seem, on the footing of wilful default: *Ibid.* But it is difficult to see why a purchaser should be in a worse position than a vendor, who is not made to account on the footing of wilful default unless there are special circumstances.

If the estate, or part of it, has been in the purchaser's personal Occupation. occupation, he will be charged with an occupation rent: *Gibson v. D'Este*, *ubi sup.*

PART II

Conditions of Sale

CHAPTER XVIII

GENERAL REMARKS ; CONSTRUCTION OF CONDITIONS OF SALE

Particulars
versus
conditions.

THE proper office of the particulars is to describe the subject-matter of the contract ; that of the conditions to state the terms on which it is sold : per Malins, V.-C., in *Torrance v. Bolton*, 1872, 14 Eq. at p. 130. And it is not the function of the particulars to deal with title at all ; that has to be dealt with on evidence, and it is the function of the conditions to state what evidence of title the purchaser is to have : per Warrington, J., *Blaiberg v. Keeves*, (1906) 2 Ch. at p. 184.

A misrepresentation in the particulars cannot be cured by information given in the conditions.

It sometimes happens that a condition, if carefully read, would enlighten a purchaser as to some point about which the particulars give incorrect information. Thus, where “four freehold ground rents of 19*l.* 4*s.* each—viz. 15*l.* ground rent and 4*l.* 4*s.* garden rent”—were put up for sale, there was a condition that the conveyance should contain “a grant on the part of the vendors of the perpetual right of user of the respective gardens now enjoyed by the tenants of each house as appurtenant to each house . . . ; but no title to the gardens is to be required by any purchaser.” The Court held that as the 4*l.* 4*s.* could not be properly described as a “freehold ground rent,” the purchaser might rescind, although the condition, if

carefully read, might have corrected the misdescription : *Robins v. Evans*, 1863, 2 H. & C. 410.

Where on a sale in lots the particulars contained a statement appended to lots 4 and 5 that the timber was to be paid for, but no such statement was appended to the other lots, the purchasers of the other lots were held entitled to assume that they would not have to pay separately for the timber ; and a general condition that timber must be paid for by valuation was considered insufficient to correct the impression made by the statements in the particulars : *Higginson v. Clowes*, 1808, 15 Ves. 516.

It is not a misrepresentation to describe the property as freehold where the vendor, though he knows there is a difficulty in proving the fact, reasonably believes that the property is freehold ; as where a 500 years' term had been enlarged under the Conveyancing Act, 1881, s. 65, but owing to a rent of 1s. having been reserved it was doubtful whether that section applied : *Blaiberg v. Keeves*, (1906) 2 Ch. 175. The rent had not been paid for fifty years, so that it was reasonable to believe that it might have been released.

If the particulars omit information as to mortgages and other incumbrances on the property, mention or notice of these matters in the conditions will not rectify the omission.

See, as to mortgages, *Torrance v. Bolton*, 1872, 8 Ch. 118 ; and as to ground rent to which the property is liable, *Jones v. Rimmer*, 1880, 14 Ch. D. 588.

In *Torrance v. Bolton* the conditions were read aloud at the sale, and the purchaser did not hear them ; they were not attached to the particulars. In *Jones v. Rimmer* the ground rent was not expressly mentioned in the conditions ; but the condition as to title mentioned the lease, and another condition stipulated that the purchaser should covenant to pay the rent under the lease.

A mere ambiguity in the particulars of sale may be corrected by the conditions. See *Camberwell case*, 1879, 13 Ch. D. 754.

And an ambiguity in the conditions may be cured by a clearer statement in the particulars. Thus, where the conditions provided for "possession" being given to the purchaser by a

certain day, but the particulars stated that the property was "in the occupation of X.," the purchaser was considered as having notice that he could not get vacant possession on the day named : *Lake v. Dean*, 1860, 28 Beav. 607.

Effect and
construction
of conditions.

The effect of conditions of sale differs materially in an action by the purchaser for his deposit and expenses, and in an action by the vendor for specific performance. The difference is owing to the fact that the Courts of common law were generally in the habit of holding men to their bargains, whilst Courts of equity relieved men from improvident or oppressive bargains, and sometimes also construed an unfair bargain in such a way as to make it fair.

This difference appears in the following cases :

If a condition relating to the title covers the objection taken by the purchaser, but is misleading, the Court will refuse to enforce specific performance at the vendor's instance, but will not (except in case of fraud) order him to repay the purchaser his deposit : *Re Banister*, 1879, 12 Ch. D. 131 ; *Best v. Hamand*, 1879, 12 Ch. D. 1 ; *National Provincial Bank and Marsh*, (1895) 1 Ch. 190.

If the vendor, knowing of restrictive covenants, uses a general common form condition covering them, but does not inform the purchaser of their existence, the purchaser, though bound by the condition, and therefore unable to recover his deposit, will not be compelled to complete : *Nottingham, &c. v. Butler*, 1886, 16 Q. B. D. 778.

If the vendor has no title at all, then a condition covering the defect in his title will succeed to the extent of precluding the purchaser from recovering his deposit, but will fail to enable the vendor to obtain specific performance : *Scott and Alvarez*, (1895) 2 Ch. 603.

This difference between the two forms of action does not, however, exist with reference to the validity of a condition for compensation in cases of essential misdescription. In such cases a condition that "an error shall not annul the sale, but compensation shall be given to the purchaser," will fail entirely ; not only can the vendor not enforce specific performance with compensation (*Dimmock v. Hallett*, 1866, 2 Ch. at p. 29), but

the purchaser can recover his deposit (*Flight v. Booth*, 1834, 1 Bing. N. C. 370).

Another difference is to be noted—namely, that between an action for specific performance brought by the vendor not offering compensation, and an action for specific performance brought by the purchaser claiming compensation. If the conditions refuse compensation to the purchaser the vendor's action may fail, but it does not follow that the purchaser's action (on the same contract) would succeed: see *Cordingley v. Cheeseborough*, 1862, 4 D. F. & J. 379.

If the procedure by summons under the Vendor and Purchaser Act, 1874, is adopted, the vendor's summons will, as regards the above matters, be on the same footing as the vendor's action for specific performance, and the purchaser's summons, if it asks for the return of the deposit, will be on the same footing as the purchaser's action for recovery of his deposit. If the purchaser merely asks for rescission, and gives the vendor notice that he does not claim the deposit, then probably the purchaser's summons will succeed, if the case is one in which a summons taken out by the vendor would have failed.

The construction of conditions of sale ought to be the same at law and in equity. The Judges are in the habit of saying that it is so. As a matter of history, the construction has been different in the past. At common law conditions were construed literally; in equity they were construed rationally. At law every stipulation in the contract was treated as of the essence of the contract: in equity minor details were not treated as essential. In equity the circumstances of the case, the work to be done by both vendor and purchaser, and the practice of conveyancers were allowed to influence the construction of the conditions of sale. Construction.

The fusion of law and equity has resulted in a literal construction being given to conditions of sale, except where the Court is bound by the authority of decided cases. Sir George Jessel's decision in *Turner and Skelton*, 1879, 13 Ch. D. 130, illustrates this. The construction which made a condition allowing compensation to the purchaser applicable to errors pointed out after completion savoured more of the common law spirit than

of that of equity ; and it was through Sir George Jessel's influence that the common law decision of *Bos v. Helsham*, 1866, L. R. 2 Ex. 72, ultimately prevailed over the equity decision of *Manson v. Thacker*, 1878, 7 Ch. D. 620. The most remarkable instance of the literal method of construction is to be found in the case of *Starr-Bowkett and Sibun*, 1889, 42 Ch. D. 375, where a condition giving the vendor power to rescind "if the purchaser should *make* any requisition which the vendor was unable or unwilling to comply with," was construed as giving the vendor power to rescind at once directly the purchaser sent in his requisitions.

In equity, undoubtedly, the Courts went too far in construing conditions so as to make them fair. Thus, the same words in a condition allowing compensation to the vendor, and in a condition allowing compensation to the purchaser, would be construed differently. Indeed, the very same condition was construed differently according as it was the vendor or the purchaser who sought to enforce the contract : see *Cordingley v. Cheeseborough*, 1862, 4 D. F. & J. 379.

In fact, Courts of equity were not careful to distinguish between the *construction* of a condition and the *effect* which ought to be given to it by the Court. They said the condition must mean so and so : if it does not it is unreasonable and ought not to be enforced. As the question whether the condition was reasonable or not did not arise at common law, it was more necessary in a Court of common law that the meaning of the contract should be determined.

If a condition is not clearly worded it will be construed favourably to the purchaser : *Seaton v. Mapp*, 1846, 2 Coll. 556 ; *Greaves v. Wilson*, 1858, 25 Beav. 290 ; *Symons v. James*, 1842, 1 Y. & C. C. C. at p. 490.

This rule is specially applicable to any new or unusual conditions of sale, "the meaning of which no purchaser knows until *ex post facto* decisions of a Court of justice inform him of it" : Wigram, V.-C., in *Morley v. Cook*, 1842, 2 Ha. at p. 115.

And even if the stipulations were prepared by the purchaser, they are construed favourably to him : *Rhodes v. Ibbetson*, 4 D. M. & G. 787.

The Conveyancing Act, 1881, s. 3, sub-s. 11, enacts that the statutory conditions implied in all sales are to have the same force given to them as if they had been conditions framed by the vendor himself, and printed at length with the other conditions of sale. See *Nottingham, &c. v. Butler*, 1886, 16 Q. B. D. 778. The sub-section is as follows: "Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court."

Statutory conditions.

If a condition contains a statement of fact, the purchaser may require proof of the fact: *Symons v. James*, 1842, 1 Y. & C. C. C. 487.

Facts stated in conditions.

A vendor who has inadvertently inserted a condition will be relieved against his mistake if the purchaser is not thereby prejudiced. Thus, where a mortgagee, who had foreclosed, inserted, through mistake, a condition that he, being a mortgagee selling under his power of sale, would only covenant against incumbrances, he was relieved from the mistake, and allowed to deduce title and convey as absolute owner: *Watson v. Marston*, 1853, 4 D. M. & G. 230. But if the purchaser would be prejudiced, the Court will not, in an action for specific performance, alter the condition, even though it is clear that, through mistake, the wrong word, or the wrong condition, has been employed: see *Browne v. Paull*, 1856, 26 L. T. o.s. 232.

Vendor's mistake.

The question sometimes arises, What are reasonable stipulations as to title, &c., to be inserted in a contract for sale? Where the purchaser had paid the deposit before the contract was drawn up, taking a receipt from the vendor referring to "the contract which is now being prepared, to be signed by the vendor and purchaser," and the vendor afterwards tendered a contract containing stipulations that the purchaser should pay the expense of investigating the title, and that if the purchaser should insist upon any objection, which the vendor should be unable or unwilling to remove, the vendor might rescind, it was held that these stipulations were unreasonable: *Mooser v. Wisker*, 1871, L. R. 6 C. P. 120.

Reasonable conditions.

Usual
conditions.

Where the same solicitor acted for both vendor and purchaser, and represented to the purchaser that certain stringent conditions of sale were usual clauses, the representation having been honestly made, the purchaser was held bound : *Minton v. Kirwood*, 1866, 1 Eq. 449 (this point not mentioned on appeal, 3 Ch. 614).

CHAPTER XIX

THE AUCTION

	PAGE
(i) Reserve Price	163
(ii) Bidding	169
(iii) Withdrawing Lots	171
(iv) Payment of Deposit	172
(v) Auctioneer's Commission	173

(i) RESERVE PRICE

ON a sale by auction the conditions of sale may (*a*) state there is a reserved price, or that the vendor reserves a right to bid, or both; or (*b*) state that the sale is without reserve; or (*c*) be silent on the point, or merely state that the highest bidder is to be the purchaser.

(a) *Sale with Reserve*

The Sale of Land by Auction Act, 1867, s. 5, after reciting that “as sales of land by auction are now conducted, many of such sales are illegal, and could not be enforced against an unwilling purchaser, and it is expedient for the safety of both seller and purchaser that such sales should be so conducted as to be binding on both parties,” enacts that “the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person.”

Sect. 6 of the same Act enacts, “where any sale by auction of land is declared, either in the particulars or conditions of such sale, to be subject to a right for the seller to bid, it shall

be lawful for the seller, or any one person on his behalf, to bid at such auction in such manner as he may think proper."

It is not easy to see what alteration sect. 6 made in the law. A vendor who reserved a right of bidding was always entitled to bid by himself, or a single agent. In *Parfitt v. Jepson*, 1877, 46 L. J. C. P. 529, Lindley, L. J., says that this section "seems to curtail the vendor's right, and to cut it down to a bid by only one person on his behalf." But even before the Act it would seem that a vendor who reserved the right of bidding could only employ one person to bid for him (called a "puffer"); because the employment of a puffer was only defensible on the ground of protecting the estate against a sale at an under-value, and the employment of more than one puffer would not be necessary for this purpose, but would show a design on the part of the vendor to screw up the price by taking advantage of the ignorance of *bona fide* bidders. See *Smith v. Clarke*, 1806, 12 Ves. at p. 483.

Probably sect. 6 has the effect of preventing a vendor, on a sale in lots, from being entitled to employ different bidders for the different lots.

No other bids. Where the vendor has reserved the right to bid, the contract will be binding on a purchaser, although there are no bidders but the purchaser and the puffer: *Bowles v. Round*, 1800, 5 Ves. 209.

Right to bid by himself. If the vendor exceeds the limited right of bidding which he has reserved, as where the vendor reserves the right to bid *by himself*, and bids by means of a third person, the sale may be avoided by the purchaser: *Rex v. Marsh*, 1829, 3 Y. & J. 331.

Right of bidding once. Where the condition was that "the vendor should have the right by himself or his agent of bidding *once*," and the auctioneer, with the vendor's sanction, bid *three* times, and then the vendor stated what the reserved price was, a purchaser, who then bid beyond the reserved price, was held entitled to avoid the purchase: *Parfitt v. Jepson*, 1877, 46 L. J. C. P. 529.

It is not clear what the effect would be of a condition that the vendor might employ two puffers. Probably in such a case the employment of two puffers would not invalidate the sale

to the extent of enabling the purchaser to recover his deposit, but the Court might refuse to enforce specific performance: see *Smith v. Clarke*, 1806, 12 Ves. at p. 483.

A very usual condition is, "the sale is subject to a reserved price, and the vendor reserves the right to bid up to the reserved price." This has the advantage of enabling the vendor to puff the sale up to the reserve, with the chance of getting a bid beyond the reserve, instead of merely buying the property in at the reserve. It is true the Act puts it in the alternative—"shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved," but, it is submitted, the vendor can do both: he can reserve a price, and also a right to bid up to that price.

Reserved price *and* right to bid.

A condition that "the sale is subject to a reserved bidding" will not be construed as a condition that "the sale is subject to a reserved price *and* to a right to the vendor to bid up to the reserve." Such a condition merely means "subject to a reserved price," and it is insufficient to enable the vendor to bid, or employ a person to bid, up to the reserve: *Gilliatt v. Gilliatt*, 1869, 9 Eq. 60.

"Reserved bidding."

It is not usual to reserve a price and give the vendor the right to bid beyond the reserved price. If such a condition were used, and it clearly expressed that the vendor could bid beyond the reserve, such a condition would, it is submitted, be valid. But if the condition were ambiguous—*e.g.* "The sale is subject to a reserved price, and also to the vendor's right to bid"—it would probably not be binding, and a purchaser who discovered afterwards that he was run up by the vendor bidding beyond the reserve would be able to avoid the purchase.

Right to bid *beyond* the reserve.

Apart from the case just mentioned, of a condition expressly enabling the vendor to bid beyond the reserve, the auctioneer may not bid a higher sum than that fixed as the reserved bidding, even though he so bids for the sake of settling a dispute between two persons who claim to have made the same bid. Thus, where the reserved bidding was fixed at 3,000*l.*, and two persons claimed to have bid 3,400*l.*, a bid by the auctioneer of 3,500*l.* was held to be unjustifiable. The persons bidding 3,400*l.* were not, however, held entitled to insist on having the

Disputed bidding.

Mock
biddings.

property put up for sale again : *Notley v. Salmon*, 1853, 1 W. R. 240.

Even where the vendors reserve the right “of bidding once or oftener, by themselves or their agent,” the auctioneer may not make a series of mock biddings one after the other : *Heatley v. Newton*, 1881, 19 Ch. D. 326. An auctioneer so acting is personally liable to the purchaser for damages : *Ibid.*

(b) *Sale without Reserve*

Where the sale is stated to be without reserve, the vendor may not bid or employ any person to bid or make any private agreement which would have the effect of putting a reserved price on the property ; and the auctioneer may not take knowingly any bidding from the vendor or his agent : *Sale of Land by Auction Act*, 1867, s. 5 ; see above, p. 163. This was the law even before the Act : see *Meadows v. Tanner*, 1820, 5 Mad. 34 ; and *Thorntt v. Haines*, 1846, 15 M. & W. 367.

If the vendor instructs the auctioneer not to sell below a certain price, but the auctioneer sells “without reserve,” the vendor cannot repudiate the contract with the purchaser on the ground that his express instructions have been contravened by the auctioneer : see *Rainbow v. Hawkins*, (1904) 2 K. B. 322.

Previous
agreement.

Where, previously to a sale which was advertised to be “without reserve,” the vendor entered into a private agreement with another person that the latter should bid 35,000*l.* at the auction, and that if there should be no higher bidding the property should be knocked down to him at that sum, this agreement was held to be inconsistent with the contract held out to the public by the vendor ; and a purchaser who had bid 49,800*l.* was allowed to repudiate the purchase : *Robinson v. Wall*, 1847, 2 Ph. 372.

No reserve,
but liberty
to bid.

Where, on a sale by the Court at the suit of a mortgagee, with liberty to all parties to bid, the auctioneer stated “that the sale was without reserve, but that the parties were at liberty to bid” (the conditions of sale being silent on the point), it was held that the mortgagee’s bidding did not vitiate the sale : *Dimmock v. Hallett*, 1866, 2 Ch. 21 (decided before the *Sale of Land by Auction Act*, 1867). Per Turner, L. J. : “The two

branches of the statement are not very consistent, but I think that they may be read together by taking the second as a qualification of the first." Per Cairns, L. J. : "The statement means that all parties were at liberty to bid, but that every bidding, if accepted, would make a contract."

Where the conditions state that the sale is "without reserve," the auctioneer is liable to pay damages to the highest *bonâ fide* bidder for breach of contract if the vendor bids at the sale : *Warlow v. Harrison*, 1858, 1 E. & E. 295, 317 (where sect. 17 of the Statute of Frauds, if it had been pleaded, might have been held to be a bar to the action). Auctioneer's liability.

But where property advertised "for peremptory sale by auction by direction of the mortgagee" was bought in at the auction by the vendor, the auctioneer was not made personally liable to an intending purchaser (the highest bidder other than the vendor's agent) for not selling peremptorily : *Mainprice v. Westley*, 1865, 6 B. & S. 420, distinguishing *Warlow v. Harrison* on the ground that there the vendor was not named or described. The authority of *Warlow v. Harrison* was doubted in *Mainprice v. Westley*, but was approved in *Johnston v. Boyes*, (1899) 2 Ch. 73.

Where the auctioneer, contrary to express authority, sells "without reserve," and then, on discovering his mistake, refuses to sign a memorandum on behalf of the vendor, the purchaser probably has a right of action against the auctioneer for this refusal : see *Rainbow v. Hawkins*, (1904) 2 K. B. 322. Cf. *Johnston v. Boyes*, (1899) 2 Ch. 73, stated below, p. 169, and the criticism on that case.

(c) *No mention of "Reserve" in Conditions*

Where the conditions of sale are silent on the point, the sale will be understood to be made without reserve, and the vendor will not be entitled to bid ; and if he does bid, either by himself or by an agent, the sale will be voidable at the option of the purchaser. No mention of reserve.

This was, even before the enactment mentioned below, the rule at law : *Berwell v. Christie*, 1776, Cowp. 395 (*Howard v. Castle*, 1796, 6 T. R. 642 : see remarks in *Thornett v. Haines*, Old rule at law,

in equity.

Sale of Land
by Auction
Act, 1867,
s. 4.

Sect. 5.

Special con-
dition as to
re-sale.

1846, 15 M. & W. 367, and *Crowder v. Austin*, 1826, 3 Bing. 368). But in equity a vendor was entitled to employ a single bidder to bid up to a reserve price in order to prevent a sale at an under-value (*Bramley v. Alt*, 1798, 3 Ves. 620, and *Conolly v. Parsons* in note thereto; *Woodward v. Miller*, 1845, 2 Coll. 279; *Flint v. Woodin*, 1852, 9 Ha. 618); but not to enhance the price indefinitely (see *Smith v. Clarke*, 1806, 12 Ves. 483, and *Flint v. Woodin*, *ubi sup.*); nor to employ more bidders than one, even though they were limited to the same sum: *Wheeler v. Collier*, 1827, Moo. & Mal. 123. This rule of equity was to some extent questioned by Lord Cranworth in *Mortimer v. Bell*, 1865, 1 Ch. 10. But the conflict and doubt were both removed by the Sale of Land by Auction Act, 1867, s. 4, which, after reciting that there was a conflict between the Courts of law and equity “in respect of the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved,” enacted that “whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law.”

Sect. 5 of the same Act (set out at p. 163, above), enacting that the particulars or conditions must state whether the sale is without reserve, &c., might conceivably be construed so as to have the effect of making every sale voidable at the option of the purchaser if the particulars and conditions are silent on the subject of a reserve, whether the vendor actually bids at the sale or not. But the object of the section is merely to prevent the vendor from selling at a reserve price, or bidding at the sale, without previously informing the purchaser of his intention either in the particulars or conditions, and that object is attained by making the sale voidable at the purchaser's option if the vendor bids without reserving the right to bid.

A condition that the purchaser should pay a deposit of 25l. per cent. and sign the contract, “and in default of compliance with either of these terms the vendors, or auctioneers on their behalf, shall be at liberty, either thereupon or within fourteen days thereafter, to declare the purchase void; and, if thereupon, that they shall be at liberty, but not obliged, to put up the property again at or as from the bidding immediately preceding,”

was considered to bind the vendor, in the event, which happened, of the highest bidder's default, to take the next highest bidding as a reserve price, at any rate at that sale. The vendor put up the property again at the second highest bidding; but, that bidder and others having refused to abide by their former offers, the property was put up at a lower figure and sold at less than the original second highest bidding. The validity of the sale was considered doubtful: *Roberts v. Bozon*, 1825, 3 L. J. o.s. Ch. 113. This construction may be doubted; the condition is a very unusual one, and may never occur again. Perhaps the Court was influenced by the fact that the vendor was a trustee.

The purchaser's own misconduct does not debar him of his right to resist specific performance on account of the vendor's unauthorised employment of a puffer: *Rex v. Marsh*, 1829, 3 Y. & J. 331, where the purchaser had bid without intending to complete, but for the purpose of obtaining an abstract of title, in order to aid the tenant of the property, who claimed to be entitled thereto. The purchaser in such a case is not invoking the assistance of the Court, and so there is no necessity for him to have "clean hands."

Purchaser's
misconduct.

The purchaser has no remedy against the vendor where, in consequence of the fictitious biddings of a stranger not authorised to bid on the vendor's behalf, the price has been run up against the purchaser: *Union Bank v. Munster*, 1887, 37 Ch. D. 51. On a sale by mortgagees under the direction of the Court in a foreclosure action, the mortgagor, unless authorised by the mortgagees to bid, is a stranger to them, and they are not responsible for his acts: *Ibid*.

Puffing by
stranger.

(ii) BIDDING

It has been laid down that, notwithstanding the Statute of Frauds, a vendor refusing to enter into an agreement with the highest bidder who complies with the conditions is liable in damages: per Cozens-Hardy, J., in *Johnston v. Boyes*, (1899) 2 Ch. 73. In that case the bidder failed to comply with the condition requiring him to pay a deposit, and therefore his action failed altogether. It is difficult to see on what principle a

Highest
bidder.

contract to enter into a contract can be sued on although the contract itself cannot be sued on owing to the Statute of Frauds. In the analogous case of a guarantee, Pollock, C. B., said in *Mallet v. Bateman*, 1865, L. R. 1 C. P. 163, "a contract to give a guarantee is required to be in writing as much as a guarantee itself." But cf. *Rainbow v. Hawkins*, (1904) 2 K. B. 322, stated above, p. 166.

On a sale by the Court, if the highest bidder were by the wrongful action of the auctioneer prevented from becoming the purchaser, it is possible that the Court would overrule the act of the auctioneer and declare the highest bidder to be the purchaser. But where two persons bid the same sum, and the auctioneer, to determine the dispute, bought the property in at a higher sum, it was held that one of the bidders could not be said to be the highest bidder, and therefore could not be declared the purchaser: *Notley v. Salmon*, 1853, 1 W. R. 240.

After the hammer is down the auctioneer becomes the agent of the highest bidder for the purpose of signing the contract; and the highest bidder cannot determine this agency by telling the auctioneer not to sign. But if the auctioneer delays signing, the purchaser is not bound. The signing must be contemporaneous: *Bell v. Balls*, (1897) 1 Ch. 663; and see below, p. 448. If the highest bidder refuses to sign, and the auctioneer does not sign, or signs too long afterwards, it is possible that the highest bidder may be liable in damages as for a tort; he has, by his conduct in bidding and then refusing to become bound, rendered the vendor's sale by auction abortive. And on the principle of *Johnston v. Boyes*, *ubi sup.*, the vendor might sue the bidder for damages for breach of contract. If the highest bidder can sue the vendor for damages for his refusal to enter into the contract to sell, the vendor can sue the bidder for his refusal to enter into the contract to buy, otherwise there would be a want of mutuality.

In the absence of stipulation, any bidding may be retracted before the hammer is down: *Payne v. Cave*, 1789, 3 T. R. 148; and *Routledge v. Grant*, 1828, 4 Bing. 653, 660. But in order to retract a bid the bidder must speak loudly enough for the auctioneer to hear: *Jones v. Nannev*, 1824, 13 Pri. 76.

The condition against retracting biddings cannot be specifically enforced (Sug. 14), except against a joint vendor or a person concurring in the sale, who bids at the sale by himself or his agent : see *Freer v. Rimmer*, 1844, 14 Sim. 391, where on a sale by the Court, with mortgagee's concurrence, the mortgagee's solicitor employed by him to bid was not allowed to retract a bidding. But on the principle of *Johnston v. Boyes*, (1899) 2 Ch. 73 (see above), the vendor might recover damages against the bidder for breach of contract ; or (as suggested above in the case of the bidder, after the fall of the hammer, refusing to sign) the retracting bidder might possibly, if there is a condition against retracting bids, be treated as liable in tort for maliciously or recklessly interfering with the auction, as his bid, even though retracted, discharges the earlier bids.

Condition as to retracting bids.

The purchaser is not disentitled to specific performance because he has bribed others not to bid : *Heffer v. Martyn*, 1867, 36 L. J. Ch. 372. Nor, on a sale by the Court, does an agreement by the purchaser with another person that they shall not bid against each other, but that one shall bid, and the property be afterwards divided between them, furnish any ground for opening the biddings or annulling the sale : *Re Carew*, 1858, 26 Beav. 187.

Bribing others not to bid.

Where bidding was by the square yard, and the property was described as " a moiety of a plot containing 2,495 square yards," the purchaser was held to have contracted to pay an amount equal to 2,495 times the sum mentioned by him, and not half that amount : *Chamberlain v. Lee*, 1839, 8 L. J. Ch. 266.

Bidding so much per square yard.

(iii) WITHDRAWING LOTS

In the absence of stipulation all or any of the lots may be withdrawn from the sale. An intending purchaser has no right of action against the auctioneer for his loss of time and expenses in attending the sale on the faith of the auctioneer's advertisement : *Harris v. Nickerson*, 1873, L. R. 8 Q. B. 286. But an auctioneer who knowingly advertises for sale land which he has no authority to sell is liable in damages to an intending purchaser : *Richardson v. Silvester*, 1873, L. R. 9 Q. B. 34.

(iv) THE PAYMENT OF THE DEPOSIT

The purchaser cannot compel the vendor to accept a cheque for the deposit if the purchaser is known to be impecunious : *Johnston v. Boyes*, (1899) 2 Ch. 73. *Seemle*, even if the purchaser is a person in good credit he cannot compel the vendor to accept a cheque : *Ibid.* But it would seem not to be negligence on the auctioneer's part to accept a cheque, unless he knew the purchaser to be impecunious. And if a mortgagee-vendor accepts a cheque, which is afterwards dishonoured, this is not such negligence as to deprive him of his costs of an abortive sale : *Farrer v. Lacy Hartland & Co.*, 1885, 31 Ch. D. 42. The auctioneer may not, without the vendor's consent, accept an I O U (*Hodgens v. Keen*, (1894) 2 Ir. L. R. 657) or bill of exchange (*Williams v. Evans*, 1866, L. R. 1 Q. B. 352).

If the conditions of sale do not state who is to receive the deposit, the auctioneer has an implied authority to receive it : see *Sykes v. Giles*, 1839, 5 M. & W. 645.

If the conditions do not state who is to receive the deposit, or merely state that the deposit is to be paid to the auctioneer without saying that he is to hold it as agent for the vendor, the auctioneer receives the deposit as stakeholder, and must retain it until the contract is rescinded or completed : *Harrington v. Hoggart*, 1830, 1 B. & Ad. 577.

The fact that the auctioneer is also the vendor's solicitor does not of itself constitute him the vendor's agent for the purposes of the deposit : *Edwards v. Hoddling*, 1814, 5 Taunt. 815.

And even if the deposit is to be paid to the vendor's solicitor, he is still only a stakeholder, unless the agreement is that it shall be paid to him as "agent for the vendor" (*Wiggins v. Lord*, 1841, 4 Beav. 30), and the solicitor paying the deposit away will, at the suit of the purchaser, be ordered to bring the same amount into Court : *Ibid.*

The mere fact that the auctioneer signs the contract "as agent for the vendor" does not make him the vendor's agent in respect of the deposit : *Furtado v. Lumley*, 1890, 6 Times L. R. 168.

If the auctioneer, being a stakeholder, pays the deposit to the vendor, he does it at his peril. If the purchase goes off, the purchaser may recover the deposit from the auctioneer: *Smith v. Jackson*, 1816, 1 Mad. 618, referring to *Burrough v. Skynner*, 1770, 5 Burr. 2639; and *Maberley v. Robbins*, 1814, 5 Taunt. 625.

When, however, the deposit is paid to the vendor's solicitor or any other person as "agent for the vendor," he holds then as agent for the vendor and not as stakeholder, and must pay the money over to the vendor on demand: *Edgell v. Day*, 1865, L. R. 1 C. P. 80. And in such a case the purchaser, if entitled to recover the deposit, cannot sue the agent, but must sue the vendor: *Ellis v. Goulton*, (1893) 1 Q. B. 350.

On a sale other than a sale under an order of the Court the auctioneer has no implied authority to hand over the deposit to the vendor's solicitor, and if he does so and the deposit is thereby lost the auctioneer will be personally liable: *semble*, *Brown v. Farebrother*, 1888, 58 L. J. Ch. 3. But on a sale under the direction of the Court (*Biggs v. Bree*, 1882, 51 L. J. Ch. 263), or out of Court where the purchase money has to be paid into Court (*Brown v. Farebrother*, *ubi sup.*), he is entitled to hand it over to the solicitor for the purpose of its being paid into Court.

Where the auctioneer holds the deposit as stakeholder, he is not liable for interest until he receives notice that the sale is either completed or rescinded: *Harington v. Hoggart*, 1830, 1 B. & Ad. 577. He is entitled to any profit made from its investment, even if the investment is made by the vendor's direction: *Ibid.*

The vendor is responsible for the deposit if it is lost through the auctioneer's default, even if the auctioneer holds it as stakeholder: see *Smith v. Jackson*, 1816, 1 Mad. 618.

(v) AUCTIONEER'S COMMISSION

In the absence of stipulation the auctioneer's commission is not payable by the purchaser. A condition that the purchaser shall pay the auctioneer's fee does not entitle the auctioneer himself to sue the purchaser: *Cherry v. Anderson*, 1876, L. R. 10 C. L. 204; *Jones v. Nanney*, 1824, 13 Pri. 76.

The auctioneer is entitled as against the vendor to a lien on the deposit for his commission: *Webb v. Smith*, 1885, 30 Ch. D. 192.

Under Order LVII. rule 2 it would seem that an auctioneer who claims a lien on the deposit for his commission can interplead paying the whole deposit into Court without prejudice to his claim. The practice before the Judicature Act was unsettled. In *Mitchell v. Hayne*, 1824, 2 S. & S. 63, it was held that he could not interplead paying the deposit less his commission into Court. But in *Annesley v. Muggridge*, 1816, 1 Mad. 593, it was held that the auctioneer was entitled to deduct his charges and expenses before paying the deposit into Court on the vendor's motion. In *Farebrother v. Prattent*, 1818, 5 Pri. 303, the deposit (less auction duty only) was paid into Court.

A condition that the purchaser shall pay the auctioneer's fee prevents the vendor's solicitor from charging the scale fee for conducting a sale by auction: *Cholditch v. Jones*, (1896) 1 Ch. 42.

CHAPTER XX

TIMBER AND FIXTURES

I. *Timber*

IN the absence of stipulation a sale of land includes the timber growing on it at the time of the sale : see *Colegrave v. Dias Santos*, 1823, 2 B. & C. 76, and cases on deterioration at p. 350, below.

The term "timber" in a contract for sale would probably receive the same definition as that given in the case of disputes between a tenant for life and a remainderman. Timber is defined in *Honywood v. Honnywood*, 1874, 18 Eq. 306, as oak, ash, and elm twenty years old and upwards, provided they are not too old to have a reasonable quantity of saleable wood in them, sufficient to make a good post : Gibbons on Dilapidations, p. 215. By local custom other trees may be "timber"—*e.g.* beech (*Aubrey v. Fisher*, 1809, 10 East, 446 ; *Dashwood v. Magniac*, (1891) 3 Ch. 306), birch if 100 years old (Gibbons, p. 214), hornbeam, whitethorn, blackthorn, cherry, chestnut, and walnut (*Chandos v. Talbot*, 1731, 2 P. Wms. at p. 606). Pollards may be included in the description "timber and timber-like trees" : *Rabbett v. Raikes* ; Woodfall, Landlord & Tenant (16th ed.), p. 658. Also, by local custom, a different test may be adopted of the period when a tree becomes timber, either a later age, or girth instead of age, but not a less age than twenty years : *Foster v. Leonard*, 1581, Cro. Eliz. 1.

A condition that the timber shall be paid for may be enforced, even if the vendor cannot give the purchaser the right to cut the timber, as where the land was copyhold (*Crosse v. Keene*, 1852, 9 Ha. 469), or was partly freehold and partly copyhold, but the vendor could not distinguish the boundaries ; *Crosse v.*

Lawrence, 1852, 9 Ha. 462. The possession of the trees is valuable in itself. As a rule where the trees cannot be cut this is a sufficient defect in the title to enable the purchaser to rescind, but if the conditions negative his right to rescind for the defect in the title he cannot escape the payment of the additional price for the timber. If, however, the contract for the sale of the timber is to be considered as a separate and distinct contract it would be incumbent on the vendor to prove, either that there was a custom of the manor entitling the tenant to cut timber, or that it was a case in which a grant of a right to cut timber might be presumed in favour of the tenant : *Ibid.*

Particulars
versus con-
ditions.

A general condition that the timber shall be paid for at a valuation does not apply where the description in the *particulars* would lead the purchaser to think that no extra price was to be given for the timber, as, for instance, where on a sale in lots there was a declaration appended to lots 4 and 5 that the timber was to be paid for, which was equivalent to a declaration that the timber on the other lots was not to be paid for : *Higginson v. Clowes*, 1808, 15 Ves. 516.

A description of lot 2 as "an orchard and nursery well planted," no such words being used in the description of lot 3, entitles the purchaser to say that a note at the foot of the particulars that the plantation "in the nursery" was to be paid for down to 6d. per stick applied to lot 2 only, although lot 3 also contained a nursery : *Jenkinson v. Pepys*, cited 15 Ves. 521.

For cases on misstatements as to timber, see above, pp. 8 and 89.

II. *Fixtures*

The question of fixtures may arise as between vendor and purchaser in two ways : (1) in the case of land sold subject to an existing tenancy, whether the purchaser is affected with notice of the right of the tenant to the tenant's fixtures, and (2) what fixtures are part of the land sold so that the vendor is not entitled to remove them pending completion or to require an additional payment for them.

With regard to (1) it is suggested that the purchaser who buys subject to an existing tenancy has notice of the tenant's right to tenant's fixtures, as this is a usual or ordinary right of tenants.

The decision in *Caballero v. Henty*, 1874, 9 Ch. 417, that the purchaser is not bound to ascertain from the tenant the terms of his tenancy, would not, it is submitted, govern the case. There the tenant had a lease for eight years, and it was held that notice of the tenancy was not notice of the lease. In the case of tenant's fixtures, the purchaser would know without inquiring of the tenant that there would be the usual tenant's fixtures. Any express agreement with the tenant as to unusual tenant's fixtures would be on a different footing, and the purchaser would not be affected with notice of the agreement.

With regard to (2) it seems clear that in the absence of stipulation a sale of land includes the fixtures, and the vendor cannot require an additional payment for them or remove them pending completion: see *Colegrave v. Dias Santos*, 1823, 2 B. & C. 76, not following a *dictum* of Lord Hardwicke's to the contrary in *Ex parte Quincy*, 1750, 1 Atk. 478. But it is difficult to define "fixtures," and it would be hazardous to affirm that the decisions as to fixtures in disputes between life tenant and remainderman, or between the heir and the executor, are authorities as to what constitutes a fixture as between vendor and purchaser.

Fixtures have sometimes been defined as things put down in such a way that they cannot be removed without doing damage to the freehold: Bacon, C. J., in *Re Armytage*, 1880, 14 Ch. D. 379. But in *Leigh v. Taylor*, (1902) A. C. 157, and *Re Hulse*, (1905) 1 Ch. 406, and other cases, the test has been the (presumed) intention of the person affixing the things.

The following things have been held to be fixtures:

Wall-papers or silk used instead of wall-paper: *D'Eyncourt v. Gregory*, 3 Eq. 382 (dispute between a remainderman and a legatee of a tenant for life who had built and furnished a new mansion-house in substitution for the old one).

Panelling: *Ibid.*

Oil-painting on wood inserted in the brickwork, or tapestry nailed to wood inserted in the brickwork: *Ibid.*, and *Norton v. Dashwood*, (1896) 2 Ch. 497.

Pictures put up as wainscot: *Cave v. Cave*, 1705, 2 Vern. 508.

Frames filled with white satin, and placed flush with the wall and nailed to it, such frames being a substitute for wall-paper, and therefore part of the wall : *D'Eyncourt v. Gregory*, 1866, 3 Eq. 382.

Carved figures and vases, though fixed only by their own weight, are fixtures if they are part of the architectural design, and not mere adventitious ornaments : *Ibid.*

Stone seats and lions on steps, if part of the design of the building : *Ibid.*

Dog-grates of considerable weight, substituted for fixed grates which had been removed : *Monti v. Barnes*, (1901) 1 Q. B. 205.

A steam crane cramped on to large stones, and kept in position by two guys : *Re Armytage*, 1880, 14 Ch. D. 379 (case under the Bills of Sale Act, 1854).

Rails and sleepers forming a tramway in a quarry : *Ibid.*

A gas-engine fixed by bolts and screws to two iron plates embedded in concrete : *Hobson v. Gorringe*, (1897) 1 Ch. 182 ; *Reynolds v. Ashby*, (1903) 1 K. B. 87.

The following have been held not to be fixtures : Hangings and tapestry (*Harvey v. Harvey*, 1740, 2 Str. 1141), even though nailed to the wall : *Leigh v. Taylor*, (1902) A. C. 157.

Stuffed birds in movable trays placed in iron glass-fronted cases affixed to the walls : *Hill v. Bullock*, (1897) 2 Ch. 482.

A chimney-glass or oil-painting placed flush with the wall and nailed to it : *D'Eyncourt v. Gregory*, 1866, 3 Eq. 382.

Looms in a mill not fixed, but steadied by iron legs let into the floor, are not comprised under the word " fixtures " in a contract for sale (*Hutchinson v. Kay*, 1857, 23 Beav. 413), nor are they " machinery belonging to the mill " : *Ibid.*

Vats standing on the ground (*Horn v. Baker*, 1808, 9 East, 215), or " standing by their own weight " : *Mather v. Fraser*, 1856, 2 K. & J. at p. 559.

A granary resting by its own weight on straddles built into the land : *Wiltshire v. Cottrell*, 1853, 1 E. & B. 674.

Parts of a machine (" jibs ") capable of being removed without injury to the rest of the machine or building : *Davis v. Jones*, 1818, 2 B. & Ald. 165.

III. *Valuation*

In a condition requiring the purchaser to pay an additional price for the timber or fixtures, it is sometimes agreed that the purchaser shall pay a fixed sum, but usually the agreement is that the price is to be ascertained by valuation. The effect of a condition for valuation, whether of timber or fixtures, or of the amount of compensation in a condition for compensation, will now be considered.

The condition may be either to sell "at a fair valuation" or "at a valuation" simply, or it may go on to specify the mode of valuation.

If the agreement is to sell at "the fair value," or "a fair valuation," or "at a valuation," without specifying the manner of valuing, the agreement would probably be enforced by the Court. In such a case "no particular means of ascertaining the value are pointed out; there is nothing, therefore, precluding the Court from adopting any means adapted to that purpose": per Grant, M. R., in *Milnes v. Gery*, 1807, 14 Ves. 407.

If the mode of valuation is specified, then, unless the agreement amounts to a submission to arbitration, the Court will not interfere with the valuation made by the valuers or their umpire; and if through a hitch in the negotiations no valuation is made, or the valuation is made in a different manner from that stipulated, the Court will, if there is no submission to arbitration, refuse to enforce the contract of sale, except where the thing to be valued is merely a non-essential adjunct.

Specified
mode of
valuation.

If the vendor has agreed to sell at a price to be fixed by named valuers or their umpire, and the valuers named have fixed the price, the vendor cannot resist specific performance on the ground that the price is inadequate: *Weekes v. Gallard*, 1869, 21 L. T. 655. If the valuation is made unfairly, the case might be different: *Ibid.* The purchaser cannot resist specific performance on the ground that the price is excessive: *Collier v. Mason*, 1858, 25 Beav. 200.

The Court will not interfere to set aside a valuation if the agreement for valuation was not a submission to arbitration; *Curus-Wilson and Greene*, 1886, 18 Q. B. D. 7.

Setting aside
valuation.

Agreement
for valuation
ineffectual.

If the agreement for valuation is not a submission to arbitration, the following events may render the agreement ineffectual :

1. The refusal of one party to appoint a valuer will make the agreement ineffectual, unless that contingency is expressly provided for : *Milnes v. Gery*, 1807, 14 Ves. 400 ; *Bos v. Helsham*, 1866, L. R. 2 Ex. 72.

2. The revocation by either party of the appointment of a valuer at any time before a valuation has been made (*Vickers v. Vickers*, 1867, 4 Eq. 529), unless the condition expressly provides for such an event. But if the valuer was named in the contract the appointment cannot be revoked by either party : *Northampton Gas Light v. Parnell*, 1855, 15 C. B. 630.

3. The inability of the valuers to agree upon an umpire (*Collins v. Collins*, 1858, 26 Beav. 306), unless this is provided for in the condition.

4. The making of the valuation at a different time or in a different manner from that stipulated : *Cooth v. Jackson*, 1801, 6 Ves. 12.

5. If the valuation is to be made in one of two ways as the vendor shall choose, the death of the vendor before choosing makes the agreement for the valuation ineffectual : *Morgan v. Milman*, 1853, 3 D. M. & G. 24.

6. A valuation which leaves the price uncertain is ineffectual. In *Hopcroft v. Hickman*, 1824, 2 Sim. & St. 130, the valuation declared the quantity of the land and the price, but provided that if there should be any error in the quantity, an allowance or deduction should be made at the rate of 42*l.* per acre if the mistake were in one part of the property, and at the rate of 82*l.* per acre if in the other part, and the valuation did not state what was the estimated quantity in each part ; specific performance was refused on the ground of the valuation being uncertain.

Obstructing
valuation.

Either party physically obstructing the valuers, and so preventing the valuation from being made, may be ordered by the Court to allow the valuation to be made. In the cases reported, it has been the vendor who, being in possession of the property, has obstructed the valuers, but the same rule would no doubt

apply to any purchaser who put any physical obstacle in the way of the valuation.

In *Morse v. Merest*, 1821, 6 Mad. 26, where the vendor refused to permit the valuers to come upon the land, Leach, V.-C., decreed that the vendor should permit the valuation to be made according to the contract, adding that if the valuation were so made, the purchaser must file a supplemental bill for a specific performance upon the terms of the valuation.

Even where the valuation was of a non-essential adjunct and therefore not necessary to enable the purchaser to obtain specific performance of the main contract, the Court made a mandatory order on an interlocutory motion to compel the vendor to allow the valuation to be made : *Smith v. Peters*, 1875, 20 Eq. 511.

The fact that a valuer refused to go on because he was told by the purchaser that he did not mean to complete, is not an interference with the valuation, such as the Court would restrain by injunction : *Darby v. Whitaker*, 1857, 4 Drew. at p. 141.

The cases in which the Court will not enforce the contract of sale because no valuation, or only an ineffectual valuation, has been made, are those where the price of the whole property is to be ascertained by valuation, and those where the price of an essential part of the property is to be so ascertained.

Result of
valuation
being
ineffectual.

The price is of the essence of a contract for sale. If the only agreement is to purchase at a price to be ascertained in a particular way, and the price is not ascertained in that way, the contract cannot be enforced at all. The Court cannot itself fix the price, because that would be not executing the agreement of the parties, but making an agreement for them : *Milnes v. Gery*, 1807, 14 Ves. 400.

If the sale of the fixtures, timber, &c. is under the circumstances non-essential to the fulfilment of the contract to sell the land, specific performance will not be refused on the mere ground that no valuation has been made, and that the price of the fixtures, timber, &c. has not been ascertained : *Richardson v. Smith*, 1870, 5 Ch. at p. 652. There the land was sold for 24,000*l.*, and furniture was to be taken at a valuation ; no valuation was made, but the contract for the sale of the land was specifically performed, the furniture, which was worth 2,000*l.*,

being regarded as a non-essential adjunct. The same principle applies to adjuncts of this sort as to cases where the whole property is sold at a fixed price, and a non-essential part of the property sold is not in existence, or the vendor has no title to it : *Richardson v. Smith*, 5 Ch. at pp. 652, 654. As to the meaning of "essential" see above, p. 78.

On the sale of a bleaching field for 7,770*l.*, the plant and machinery, which were to be taken at a valuation, were regarded as non-essential adjuncts or "subordinate appendages," and the non-valuation thereof was held not to be a bar to the specific performance of the contract to sell the land : *Jackson v. Jackson*, 1853, 1 Sm. & G. 184.

On the sale of a public house, the tenant's fixtures and furniture may be non-essential : *Smith v. Peters*, 1875, 20 Eq. 511, where Jessel, M. R., said there was "no evidence that the value of the fixtures and furniture was so large as to be an essential portion of the contract." But in *Darby v. Whitaker*, 1857, 4 Drew. 134, where no distinction was drawn between a non-essential and an essential adjunct, the fact that no valuation had been made of the tenant's fixtures, furniture, and stock-in-trade caused the Court to refuse specific performance of a contract for the sale of a public house. Generally, on the sale of a public house as a going concern, the fixtures would seem to be an essential adjunct.

Arbitration.

An arbitration is, properly speaking, a judicial inquiry worked out in a judicial manner, the arbitrator hearing the case of each party and deciding upon evidence laid before him. It presupposes the existence at the time the inquiry is held of a dispute or difference between the parties. The Arbitration Act, 1889 (which applies to an arbitration commenced after December 31, 1889, under any agreement made either before or after that date, see sect. 25), only affects, in addition to a reference under an order of Court, "a written agreement to submit present or future *differences* to arbitration" : sect. 27.

A valuation is not an arbitration, it is an inquiry as to the value of property held for the purpose not of settling a dispute which has arisen, but of preventing a dispute : per Lord Esher, in *Curus-Wilson and Greene*, 1886, 18 Q. B. D. 7.

The following condition is not a submission to arbitration :
“ Each party shall appoint a valuer and give notice thereof by writing to the other party within fourteen days from the date of the sale. The valuers thus appointed shall, before they proceed to act, appoint by writing an umpire, and the two valuers or, if they disagree, their umpire shall make the valuation. Each party shall pay the charges of his own valuer and one-half the charges of the umpire. If either party shall neglect to appoint a valuer or to give notice to the other party within the time aforesaid, the valuer appointed by the other party shall make a valuation alone, which shall be binding on the vendor and purchaser ” : *Carus-Wilson and Greene, ubi sup.*

A condition for compensation for misdescription—“ such compensation or equivalent to be settled by two referees, one to be appointed by either party or an umpire to be named by the referees before they enter upon the reference, whose decision shall be final ”—is not a submission to arbitration : *Bos v. Helsham*, 1866, L. R. 2 Ex. 72.

The agreement that compensation shall be settled by arbitration is not an agreement that the question whether there is a right for compensation shall be settled by arbitration : *Evans v. Robins*, 1862, 31 L. J. Ex. at p. 472.

CHAPTER XXI

TITLE

	PAGE
I. Generally	184
II. Doubtful Title	186
III. Purchaser's Knowledge	211
IV. Conditions as to Title generally	213
V. Commencement of Title	237
VI. Registered Land	245
VII. Notice of Documents	246
VIII. Identity	250
IX. Conditions as to certain Special Matters	254
X. Delivery of Abstract : Waiver of Requisitions	262
XI. Procedure	277

I. GENERALLY.

EVEN apart from express agreement the vendor is bound to show a good title according to the description in the particulars, and to make out a proper abstract of his title and deliver it to the purchaser, and to verify the abstract by proper evidence, except so far as he is relieved of this duty : (i.) by the fact that the purchaser knew, or had notice before the contract, that he could not get a good title ; (ii.) by conditions of sale or the statutory provisions limiting the purchaser's right to call for the title and demand evidence.

The right of the purchaser to have a good title is rested by Lord St. Leonards on an implied agreement in the contract for sale : see Sug. p. 16. Sir William Grant regarded it as a collateral right given by the law : *Ogilvie v. Foljambe*, 1817, 3 Mer. at p. 64. See, too, *Ellis v. Rogers*, 1885, 29 Ch. D. at p. 670.

An analysis of the cases in which the vendor's title has been held to be bad belongs rather to the general law of real property, and is beyond the scope of this book. But a few words must be said as to the application of the rule that the vendor is

bound to make a good title to cases where the vendor does not mention the tenure or does not purport to sell the fee.

If the tenure is not specified, the implication is that the tenure is freehold. But it is suggested that where copyhold is sold without any mention of the tenure in the written contract, the implication that the land was sold as freehold may be rebutted by evidence that the purchaser knew the land to be copyhold; and as he did not bargain that it should be enfranchised he cannot require the vendor to enfranchise or resist specific performance of the sale of the land as copyhold. If, however, the contract expressly describes the land as freehold, evidence that the purchaser knew the land was copyhold would be inadmissible.

What sort
of title is
implied.

A contract for the sale of land implies a sale in fee-simple: per Parke, B., in *Hughes v. Parker*, 1841, 8 M. & W. 244; and it is implied that the vendor has an unencumbered freehold title: *Phillips v. Caldcleugh*, 1868, L. R. 4 Q. B. 159. An agreement to sell *simpliciter* implies a sale of all the vendor's interest: *Bower v. Cooper*, 1843, 2 Ha. 408. Rights necessary to the title or to the due enjoyment of the property are also implied. Thus, on a sale of ground rents, a purchaser is entitled to expect a power of distress and entry: *Langford v. Selmes*, 1857, 3 K. & Jo. 220; *Lecoy v. Mogford*, 1856, 2 Jur. N. S. 1084.

Specific performance of a contract to sell land will not be enforced if there is no way to the land so that the purchaser cannot enjoy what he has bought, and specific performance of a contract to sell "arable land" will not be enforced if there is no right of cart-way or carriage-way to the land: *Denne v. Light*, 1857, 8 D. M. & G. 774. But the Court will not, under the inquiry as to title, require the vendor to prove a right of way to the property where there is no contract for a right of way, because this is not a matter of title. See *Curling v. Austin*, 1862, 2 Dr. & Sm. 129, where the property sold was a coach-house and stables which had existed for forty years, and there was apparently a right of way.

The description of a house as "now in the occupation of C. under a lease for twenty-one years from Lady Day, 1847," was held to include not merely so much of the house as C. was

occupying, but the whole of the premises demised by the lease, and therefore to include a cellar under the house which, at the time of the sale, was in the occupation of the lessor (who was also the owner of the adjoining house), but at the time of the demise was not known to exist: *Whittington v. Corder*, 1852, 16 Jur. 1034.

Sale of lease.

On a contract for the sale of a subsisting lease, the purchaser cannot be compelled to accept a new lease as original lessee, because his liability under the lease would be greater than that under the assignment: *Mason v. Corder*, 1816, 2 Marsh. 332.

A contract to sell a lease cannot be satisfied by selling a *voidable* lease: *Penniall v. Harborne*, 1848, 11 Q. B. 368. And a contract to grant a lease implies a contract to grant a *valid* lease: *Stranks v. St. John*, 1867, L. R. 2 C. P. 376. So on a contract to sell an agreement to lease, the vendor is bound to show that he has a title to a *valid* agreement. If the vendor has a mere voidable agreement, the purchaser is entitled to repudiate the contract: *Brewer v. Broadwood*, 1882, 22 Ch. D. 105.

On the sale of a lease containing a covenant to build additional houses and deliver them up at the end of the term, the title to the lease is bad if the houses are not built, even though the covenant to build has been waived, and the covenant to deliver up might be escaped by assigning to a pauper before the termination of the lease: *Nouaille v. Flight*, 1844, 7 Beav. 521.

Sale in lots.

On a sale in lots, if one man buys two lots which would more conveniently be occupied together (*e.g.* a house and an adjoining meadow), he is not obliged to complete the purchase of either unless the vendor can show a good title to both: *Gibson v. Spurrier*, 1795, Pea. Add. Ca. 49.

II. DOUBTFUL TITLE

In order that the vendor may compel specific performance his title must (except so far as this is guarded against by conditions) not only be good in the opinion of the Judge who decides the dispute between the vendor and the purchaser, it must be one which is free from reasonable doubt: *Pyrke v. Waddingham*, 1852, 10 Ha. 1.

The same rule does not apply to the case of a purchaser suing for the return of his deposit or for damages for the vendor's breach of contract, and probably also would not apply to the case of a vendor suing for damages, because these are common law remedies and governed by different considerations. At common law (though there has been some difference of opinion on this point) the Courts held either that the title was good or that it was bad; they did not order the deposit to be returned or damages granted to the purchaser on the ground that the vendor's title was doubtful: *Nottingham, &c. v. Butler*, 1886, 16 Q. B. D. at pp. 778, 787, 789. [NOTE.—The common law cases where the deposit was recovered on the ground of doubtful title are *Hartley v. Pehall*, 1792, Peake, 131; *Barnwell v. Harris*, 1 Taunt. 430; *Wilde v. Fort*, 1812, 4 Taunt. 334; *Curling v. Shuttleworth*, 1829, 6 Bing. 121, 134; *Pott v. Turner*, 1830, 4 Moo. & P. 551; *Jeakes v. White*, 1851, 6 Ex. 873; and *Simmons v. Heseltine*, 1858, 5 C. B. n.s. 554, 571. The cases to the contrary, in addition to *Nottingham, &c. v. Butler*, *ubi sup.* are *Oxenden v. Skinner*, 1798, 4 Gwill. on Tithes, *Maberley v. Robins*, 1814, 5 Taunt. 625; *Romilly v. James*, 1815, 1 Marsh. 592, 600; and *Boyman v. Gutch*, 1831, 7 Bing. 379, 380.] In *Clarke v. Willott*, 1872, L. R. 7 Ex. 313, where a return of the deposit was ordered, the title was not only doubtful as depending on a doubtful state of facts, but bad because the Court held that the vendor, having previously executed a voluntary conveyance, could not compel the purchaser to concur in defeating that conveyance, and until the purchaser accepted a conveyance and gave valuable consideration the vendor was unable to make a good title. And in *Heywood v. Mallalieu*, 1883, 25 Ch. D. 357, and *Nottingham, &c. v. Butler*, *ubi sup.*, the return of the deposit was ordered because a misleading statement had been made (see above, p. 12).

The practice on a vendor and purchaser summons is not settled. In *New Land, &c. and Gray*, (1892) 2 Ch. 138, and *Marshall and Salt*, (1900) 2 Ch. 202, the purchaser recovered the deposit and expenses on the ground of doubtful title, but the question of the jurisdiction to order the return of the deposit on this ground was not argued. In *Wallis and Barnard*, (1899)

2 Ch. 515, Kekewich, J., expressed the view that on a vendor and purchaser summons the Court should decide the title one way or other, and that the title should not be held doubtful, except in an action for specific performance. This, however, is contrary to the usual practice; see above, and also *Carter and Kenderdine*, (1897) 1 Ch. 776; *Hollis' Hospital and Hague*, (1899) 1 Ch. 540; and *Handman and Wilcox*, (1902) 1 Ch. 599. And the course suggested is open to the objection that it would be unseemly for the Court on summons to declare the title good, and afterwards in an action for specific performance to declare it doubtful. And with regard to the deposit and expenses it is submitted that on a summons, if the Judge considers that the title is doubtful so that he would refuse specific performance if a writ had been issued, the right course is to make no order except that the vendor do pay the costs. The return of the deposit and payment of the purchaser's expenses depend on common law principles, and should not be ordered unless the title is bad.

On a sale by the Court, if the title is doubtful the practice is for the deposit to be paid out to the purchaser.

The reason for the rule in *Pyrke v. Waddingham* is, that a decision in favour of the vendor "does not technically bind any one else but the parties actually before the Court, and does not prevent any person not bound by the decision from at any time bringing fresh litigation upon the purchaser with reference to the same title": per Jessel, M. R., in *Osborne to Rowlett*, 1880, 13 Ch. D. 774. Even a decision of the House of Lords in favour of the vendor would not be decisive, though such a decision "would give a sanction to the title which would probably operate to the security of the purchaser": *Jervoise v. Northumberland*, 1820, 1 J. & W. at p. 569.

Doubtful
title, what.

The question what is a "doubtful" title is one of great difficulty. The test applied in *Mullings v. Trinder*, 1870, 10 Eq. 449, was, "Would a sensible man differ from the conclusion to which the Judge has come?" In *Pyrke v. Waddingham*, 1852, 10 Ha. 1, one test was, "Is the title one that other competent persons would think to be good?" In *Rogers v. Waterhouse*, 1858, 4 Drew. 329, the test was, "Can

I say that I have so clear an opinion as to think that no other Judge could take a different view ? ” Cf. *Thackwray and Young*, 1888, 40 Ch. D. at p. 39. In *Burnell v. Firth*, 1867, 15 W. R. 546, the doubt was on “ a point of much nicety on which opposite judgments might be expected from different Judges.”

In many cases the probability of litigation has been made the test. In *Cattell v. Corrall*, 1840, 4 Y. & C. at p. 237, the words are “ a reasonable, decent probability of litigation.” See too *Heaysman and Tweedy*, 1893, 69 L. T. 89. “ The Court cannot force on anybody a title which it is evident will involve the taker in immediate litigation ” : *Pegler v. White*, 1864, 10 Jur. N. S. 330. The Court will not decree specific performance “ where the rectitude of the title depends upon facts which very probably will be disputed, and are certainly capable of being disputed ” : *Nottingham, &c. v. Butler*, 1886, 16 Q. B. D. 787. On this ground the Court refused specific performance of a contract to sell a leasehold public house, where the lease contained a covenant against assignment without the consent of the lessor (not to be unreasonably withheld), and the lessor refused to consent to the assignment on the ground that the purchasers were brewers, and he wished the house to remain a free house : *Marshall and Salt*, (1900) 2 Ch. 202. Probability litigation.

The probability of litigation may turn the scale and cause the title to be held doubtful, although, but for the notice of an adverse claim, the title might have been forced on a purchaser. This seems to have happened in *Hollis' Hospital and Hague*, (1899) 2 Ch. 540.

The refusal of the vendor to give the purchaser a covenant of indemnity against any possible litigation was treated in *Marshall and Salt*, (1900) 2 Ch. 202, as showing that the purchaser's objection was tenable (but *qu.?*)

On the sale of a lease the fact that the lessor had commenced an action of ejectment for breach of the covenant to repair was held not to make the title doubtful, as the action had nearly a year before been stayed in default of delivery of particulars of breach : *Ringer to Thompson*, 1881, 51 L. J. Ch. 42.

The existence of a *lis pendens* does not of itself make the title doubtful ; it merely throws on the purchaser the duty of

looking into the action to see if a charge on the property is claimed or the title to the property affected in any way: *Bull v. Hutchens*, 1863, 32 Beav. 615. Lord Truro held that the title ought to have been forced on the purchaser where "there was nothing more than a notice that the heir meant to dispute the will" (on the validity of which the title depended), "and that he meant to dispute it on grounds as to which it was impossible, from an inspection of the will, for the Court to come to any judgment impeaching its validity": *Grove v. Bastard*, 1851, 1 D. M. & G. 69. In *Osbaldiston v. Askew*, 1821, 2 J. & W. 539, the Court allowed the Master's report on a reference of title to proceed, notwithstanding pending litigation against the vendor in respect of part of the property sold.

Sometimes (as in *George v. Thomas*, 1904, 90 L. T. 505), where litigation is threatened, the Court will adjourn the hearing of the vendor's action for specific performance for a period in order to see whether steps will be taken by the adverse claimant. If within that period no step is taken, the Court may then consider the claim as shadowy and decree specific performance. And if the claimant has actually begun his action before the vendor's action for specific performance comes on, the usual course is to postpone the hearing of the latter action until the adverse claim has been adjudicated on. It is not quite clear how the costs of the vendor's action for specific performance ought to be dealt with in these cases where the adverse claim fails or is abandoned. The writer believes that the usual practice is to saddle the purchaser with the costs of the action. This may be right where the claim is not prosecuted at all. But it seems unfair if litigation actually takes place. In such a case, even if the claim fails, so that the purchaser is ultimately in the wrong, he was in the right at the time when he refused to complete on account of the threatened litigation; the vendor knew of the dispute and ought to have settled it before he sold. In *Bull v. Hutchens*, 1863, 32 Beav. 615, where the purchaser objected to complete because an order of the Court of Probate ordering payment of an annuity had been made in an action registered as a *lis pendens* and it was doubtful whether the order created a charge on the land, the vendor, after succeeding

in his litigation with the assignee of the annuity who claimed a charge, obtained a decree for specific performance with costs, partly on the ground that the purchaser had refused the offer which the vendor made (after the adverse claim had been disposed of) to stop the action if the purchaser would complete and pay costs up to date.

The Court will not compel a vendor to enter into litigation with an adverse claimant in order to perfect his title : per Turner, L. J., in *Williams v. Glenton*, 1866, 1 Ch. at p. 208.

A "shadowy and frivolous claim" will not make the title doubtful : *Heseltine v. Simmons*, 1858, 6 W. R. 268. So, a mere claim not followed up by any act, and without any fact stated as a foundation for it, is not sufficient to make the title doubtful (*Green v. Pulsford*, 1839, 2 Beav. 70), especially if the purchaser has accepted the title : *Harry v. Davey*, 1876, 2 Ch. D. 721. But a claim of adverse rights over the property which have been exercised in the past, though not recently, would appear to make the title bad or doubtful : see *Heywood v. Mallalieu*, 1883, 25 Ch. D. 357.

In cases where there is a probability of adverse rights existing, the fact that there is little probability of the adverse rights being exercised has sometimes been held sufficient to enable the Court to force the title on the purchaser. See an anonymous case in Sug. 393, and also *Lyddall v. Weston*, 1739, 2 Atk. 19. But these cases are extremely doubtful, and would probably not be followed, and the principle governing them—viz. that "it is impossible, in the nature of things, that there should be a mathematical certainty of a good title" (see 2 Atk. p. 20)—has been explained as meaning merely "that you cannot prove title by means of reasoning, but only with the help of evidence" : per Alderson, B., in *Hutchinson v. Morritt*, 1839, 3 Y. & C. at p. 554.

Probability of
rights being
exercised.

The test "is the title marketable?" is sometimes applied, as in *Stapylton v. Scott*, 1809, 16 Ves. 272, and *Moulton v. Edmonds*, 1859, 1 D. F. & J. 246. But this is really no test at all, because a marketable title is itself defined as one "which may, at all times, and under all circumstances, be forced upon an unwilling purchaser" : *Pyrke v. Waddingham*, 1852, 10 Ha. at

Marketable
title.

p. 8. And in *Lowes v. Lush*, 1808, 14 Ves. 547, it was said that the purchaser was entitled to “an *available* title, not merely a marketable title, but one which he can take with reasonable safety.”

The test “Can the Court warrant the title to the purchaser ?” was used in *Heath v. Heath*, 1782, 1 Bro. C. C. 147, and in *Lowes v. Lush*, 1808, 14 Ves. at p. 550. And again, “Would the Court trust its own money on the title ?” : per Lord Eldon, in *Jervoise v. Northumberland*, 1820, 1 J. & W. 559.

With the exception that the existence of actual litigation makes the title doubtful, none of the foregoing tests appears satisfactory. It will be more profitable to examine the cases of doubtful title under separate heads, distinguishing cases where the facts are doubtful from cases where the law is doubtful.

(1) *Facts doubtful*

If the vendor has no evidence or no sufficient evidence of facts which he is bound to prove, the title is doubtful, and will not be forced on an unwilling purchaser. The vendor is bound to prove all the facts on which his title rests, except so far as he is relieved by any presumption of fact made by the Court, or by the express or statutory conditions of sale.

The matter of fact upon which a title depends may be such as not in its nature to be capable of satisfactory proof, and such a title a purchaser cannot be compelled to take ; or the fact may, in its nature, be capable of satisfactory proof and yet not satisfactorily proved : per Leach, V.-C., in *Smith v. Death*, 1820, 5 Mad. 371.

A title is doubtful if it depends upon the establishment of “facts and dealings of a complicated and ambiguous nature such as are not merely practically capable of being challenged or put in issue but not unlikely to be raised” : *Douglas and Powell*, (1900) 2 Ch. at p. 314.

It has been said that a title is doubtful if it depends for its validity on estoppel or acquiescence, which involve controverted facts : *semble*, *New Land, &c. and Gray*, (1892) 2 Ch. 138. But the fact that a restrictive covenant had been waived by acquiescence was held to have been proved and the title forced

on the purchaser in *Hepworth v. Pickles*, (1900) 1 Ch. 108, and *Re Summerson*, *ibid.* 112 (note).

Where the vendor is called upon to prove a negative, the title is doubtful because it is impossible satisfactorily to prove a negative. Thus, where the vendor had to prove that he had no creditor who could take advantage of an act of bankruptcy which he had committed, this was a fact which the vendor could not prove satisfactorily because his own testimony was insufficient, and any inquiry directed by the Court as to creditors would be unavailing, as the creditors would not be bound by it : *Lowes v. Lush*, 1808, 14 Ves. 547. So, too, a title depending on the question whether a previous purchaser bought without notice of restrictive covenants is a doubtful title ; the Court may be satisfied, on the evidence before it, that the prior purchaser had no notice, but subsequent litigation may bring fresh evidence to light : *Nottingham, &c. v. Butler*, 1886, 16 Q. B. D. 778. So, where the safety of the title depends on the question whether the vendor had notice of a prior registered judgment, the vendor's evidence and that of his agents that he had no notice is insufficient, as fresh evidence might afterwards be obtained proving the contrary : *Freer v. Hesse*, 1853, 4 D. M. & G. 495. And the Court will not force on the purchaser a title the validity of which depends on the question whether the vendor bought without notice of facts which would invalidate a lease granted under the Settled Land Act : *Handman and Wilcox*, (1902) 1 Ch. 599 ; but see per Lindley, L. J., in *Mogridge v. Clapp*, (1892) 3 Ch. at foot of p. 395.

On a sale by the trustees of a voluntary settlement made more than two but less than ten years ago, the title was held to be doubtful as depending on proof that the settlor was at the time of making the settlement able to pay his debts without the aid of the property comprised in the settlement, a fact which could not be proved in advance as against a future trustee in bankruptcy : *Briggs and Spicer*, (1891) 2 Ch. 127. It is now, however, decided that such a title is good, because a subsequent bankruptcy would not have the effect of making the settlement void *ab initio*, and a sale by the trustees of the property comprised in the settlement would prevent a future trustee in

Proof of
negative.

bankruptcy of the settlor avoiding the settlement: *Carter and Kenderdine*, (1897) 1 Ch. 776 C. A. approving *Re Vansittart*, (1893) 2 Q. B. 377, and *Re Brall*, *ibid.* 381. Presumably three months had elapsed before the completion of the purchase, so that even if the vendor afterwards became bankrupt the purchaser's equity was acquired (see *Rayner v. Preston*, 1881, 18 Ch. D. at p. 13) before any effective act of bankruptcy.

Oral evidence.

Some Judges have considered a title to be doubtful if it depends on oral evidence. In *Briggs and Spicer*, (1891) 2 Ch. 127, Stirling, J., held a title to be doubtful because it depended on a fact which could not be proved merely by documentary evidence. The witnesses, he said, "are not under the purchaser's control; when they are wanted they may not be found, or they may be out of the jurisdiction, or possibly dead. Even if the purchaser should succeed in producing them, it is impossible to anticipate by what rebutting evidence their testimony may be met, or what may be the effect of cross-examination": *Ibid.* 133. The learned Judge, in so deciding, was materially influenced by the rule laid down by Leach, V.-C., in *Emery v. Grocock*, 1821, 6 Mad. 54: "If the case be such that, sitting before a jury, it would be the duty of a Judge to give a clear direction in favour of the fact, then it is to be considered as without reasonable doubt; but if it would be the duty of a Judge to leave it to the jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser." If the rule in *Emery v. Grocock* stands, then, inasmuch as the question whether a witness is to be believed or not is necessarily left to the jury, every title resting on a fact proved by oral evidence would have to be held doubtful. But the rule in *Emery v. Grocock* has been unfavourably criticised by Kekewich, J., in *Mogridge v. Clapp*, (1892) 3 Ch. at p. 392. Wickens, V.-C., also, in *Re Belton's Trust Estate*, 12 Eq. at p. 558, says: "I by no means hold that a title depending on parol evidence is always a bad one."

A possessory title, which of course depends on oral evidence, may be forced on the purchaser: *Scott v. Nixar*, 1843, 3 Dr. & War. at p. 405; *Games v. Bonnor*, 1884, 54 L. J. Ch. 517; *Groves v. Loomes*, 1885, 53 L. T. 592.

The fact that the vendor, who had taken a lease from a tenant for life, had dealt with the tenant for life in good faith, within sect. 45 of the Settled Land Act, 1882, was held to be proved by the evidence of the lessor and vendor, who were cross-examined at the hearing : *Mogridge v. Clapp*, (1892) 3 Ch. 382.

In another case the vendor was held to have satisfactorily proved that a person under whom he claimed answered the description "who should be brought up and educated as a member of the established Church of England and should be a constant frequenter of such church" : *Smith v. Death*, 1820, 5 Mad. 371.

The fact that the covenants in a lease have been performed is a fact admitting of proof, and the affidavit of the vendor that to the best of his knowledge and belief the covenants have been performed will be sufficient proof unless the purchaser can adduce proof of a breach : *Ringer to Thompson*, 1881, 51 L. J. Ch. 42.

The fact that a solicitor, who purchased from his client, had given a fair price for the property, was proved to a large extent by oral evidence, and the title was forced on the purchaser, although the evidence of the client himself was not taken : *Spencer v. Topham*, 1856, 22 Beav. 573.

A further source of doubt is suggested by Leach, V.-C., in *Emery v. Grocock*, 1821, 6 Mad. 54 : "There may be doubt, even if the vendor adduces direct evidence of a fact upon which his title rests, because such evidence may be given *malâ fide*, or if given *bonâ fide* it may be mistaken." But in such a case either the evidence is disbelieved by the Court, or else the Court considers that additional evidence is necessary ; in other words, the vendor has not proved, or has not sufficiently proved, facts which he is bound to prove. On the other hand, if the evidence is believed by the Court to be true, and additional proof is not considered necessary, the vendor has proved the facts which he is bound to prove, and the Court will hold a title resting upon that evidence to be good : see *Mogridge v. Clapp*, (1892) 3 Ch. at p. 392.

There are many facts which a vendor will not be required to prove, because the Court will presume them in his favour. It

Pre-
sumptions.

is beyond the scope of this treatise to enumerate all the presumptions of fact which the Court will make in regard to matters upon which the vendor's title may depend. The following are a few instances of presumptions which have been made :

The identity of persons named in the title deeds is presumed from the identity of names. See *Coventry's Conveyancer's Evidence*, p. 321, and *Nicholson v. Burkholder*, 21 United Canada R. 108.

Where deeds recited in a document of title have been lost, it is presumed from the fact of their having been recited that they contain nothing adverse to the title : *Prosser v. Watts*, 1821, 6 Mad. 59.

Where the purchaser objected to the title on the ground that the Crown was entitled to the mines under the land, the Court presumed the non-existence of mines from the fact that no search had been made for upwards of a century ; and the reservation of mining rights being no objection to the title if it is proved that there are no mines, the Court forced the title on the purchaser : *Lyddal v. Weston*, 1739, 2 Atk. 19.

In Ireland, the Court has presumed in favour of the vendor that a lady, aged 63, was incapable of child-bearing : *Browne v. Warnock*, 1880, 7 L. R. Ir. 3. But in the English Courts, it is believed, a similar presumption will not be made in favour of the vendor.

But there is a large and important class of presumptions which requires a more detailed examination—viz. presumptions as to extrinsic facts. As to this class of facts the law is not perhaps well settled, and the following rule may be worded in too sweeping a manner, but the tendency is in the direction of such a rule.

The Court presumes the non-existence of facts adverse to the title, unless there is some indication on the abstract of the existence of such facts, or some other evidence giving rise to a suspicion of their existence. If, however, there is an indication in the abstract itself or other evidence giving rise to suspicion of the probable existence of a fact adverse to the title, the vendor must adduce evidence to disprove the adverse fact.

One of the most important presumptions comprised in the rule as to the presumption of the non-existence of facts adverse to the title is that whereby a transaction is assumed to be *bonâ fide* in the absence of any circumstances raising doubt or suspicion. The rule indeed is nowhere laid down in general terms, and the application of the rule is not always easy, since it is in many cases difficult to say whether the circumstances raise suspicion.

In *Cattell v. Corrall*, 1840, 4 Y. & C. 228, the vendor was held not bound to prove that a conveyance by him for the benefit of his creditors was not invalid as being a conveyance of all his property, or as being intended to favour one creditor more than another, or as being made in contemplation of bankruptcy, there being no indication of any such facts on the abstract, and five years having elapsed since the conveyance, and the vendor not having become bankrupt. But in *Hartley v. Smith*, 1819, Buck, 368, the possibility of the existence of facts (not appearing on the abstract or known to the purchaser) which would render a deed under which the vendor claimed invalid on the ground of *mala fides*, was considered a sufficient reason for holding the title doubtful. But this case is doubted by Sir Edward Fry (Sp. Perf. p. 413), and does not seem to have been followed.

On a sale by the trustee of a deed of arrangement the debtor having been made bankrupt on a petition presented more than three months after the date of the deed, the title was held doubtful unless the vendor procured the concurrence of the trustee in bankruptcy, on the ground that it was possible that the trustee in bankruptcy might obtain further evidence which would enable him to upset the deed : *Poppleton and Jones*, 1896, 74 L. T. 582.

Where one link in the title is a sale by an executor of part of his testator's personal estate, the Court presumes, in the absence of special circumstances, that he was selling as executor. The fact that an executor conveyed as beneficial owner, and was not described as an executor in the conveyance, does not raise a suspicion that he was selling otherwise than as executor : *Venn and Furze*, (1894) 2 Ch. 101. But where an executrix suppressed the will and executed a mortgage in the testatrix's

Sale by
executor

name, the Court could not presume that the mortgage was executed by her as executrix : *Scott and Alvarez*, (1895) 1 Ch. 596. And where the purchaser has notice that there are no debts remaining unpaid the vendor cannot force him to take a title depending for its validity on the right of the vendor to sell as executor : *Verrell's Contract*, (1903) 1 Ch. 65.

By trustee.

Where one link in the chain of title was a conveyance by a tenant for life and by the survivor of two trustees for sale, reciting an agreement by the tenant for life and the trustee to sell, but purporting to be a conveyance by the tenant for life under the Settled Land Act and by the trustee by way of confirmation, the title was forced on the purchaser on proof that the recital was accurate. The reference to the Settled Land Act was held not to raise the inference that the trustee had abandoned his intention of selling as trustee or that the agreement to sell was virtually the contract of the tenant for life only : *Knowles and Goldsmith*, Stirling, J., April 26, 1899.

Sale by trustees at undervalue.

Where property which had been bought in 1810 for 462*l.*, was in 1855 sold by trustees for sale for only 73*l.*, and in 1859 the purchaser from the trustees contracted to sell it for 350*l.*, it was held that the title was bad and not merely doubtful, and the deposit was ordered to be returned : *Stevens v. Austin*, 1861, 7 Jur. N. S. 873. But the fact that recently appointed trustees for sale sold the reversion to a person who had already bought the life estate in the same property, and that on a sale by auction eighteen months afterwards a profit of 2,000*l.* on 19,000*l.* was made, was not considered as raising a suspicion of *mala fides* : *Alexander v. Mills*, 1870, 6 Ch. 124. And the fact that in 1894 a trustee sold property for one-half of the price which the property realised in 1898 was held not to make the title doubtful, as the increase in price could be explained by the fact that the purchaser from the trustee had improved the property by pulling down a house and granting a building lease which the trustee had no power to do : *Knowles and Goldsmith*, Stirling, J., April 26, 1899.

Possibility of unfairness.

In the case of a title depending on the validity of a purchase by a solicitor from his client (*Spencer v. Topham*, 1856, 22 Beav. 573), or a father from his son (*Boswell v. Mendham*, 1822,

6 Mad. 373), evidence of the fairness of the transaction must be produced.

And if a trustee for sale has himself purchased, very strong evidence of the assent of the beneficiaries will be required. *Williams v. Scott*, (1900) A. C. 499; *Douglas and Powell*, (1902) 2 Ch. 296. But a purchase by a trustee twelve years after he has ceased to be a trustee is not of itself suspicious: *Boles and British Land Co.*, (1902) 1 Ch. 244.

A sale by trustees to the purchaser of a life interest in the settled estates (*Alexander v. Mills*, 1870, 6 Ch. 124), or to a tenant for life whose consent is necessary to a sale (*Howard v. Ducane*, 1823, T. & R. 81), does not make the title doubtful. See also *Dicconson v. Talbot*, 1870, 6 Ch. 32.

A sale by a mortgagee to his solicitor would appear not to be voidable at the instance of the mortgagor: *Nutt v. Easton*, (1899) 1 Ch. 873 (where the mortgagor had stood by for ten years).

On a sale by a mortgagee who has foreclosed, the mere possibility that facts may exist which would enable the mortgagor to reopen the foreclosure does not, it is suggested, make the title doubtful.

On a sale by a mortgagee under his statutory power of sale, if the purchaser can prove that the vendor was improperly exercising the power he can resist specific performance: *Life Interest, &c. and Hand in Hand*, (1898) 2 Ch. 230.

On a sale by a company which had previously issued debentures by way of floating security, it was held that the purchaser was entitled to reasonable evidence that there had been no default in payment of the principal or interest of the debentures: *Horne and Hellard*, 1885, 29 Ch. D. 736.

The mere fact that it is possible for the vendor to have forfeited his interest under a forfeiture clause, there being no special reason for suspecting that any forfeiture has occurred, does not put the vendor to proof of there having been no forfeiture: *Maling v. Hill*, 1785, 1 Cox, 186.

The fact that on a previous sale of part of the property which was subject to the custom of gavelkind, one half of the purchase money was paid to the two infant owners and the other half to

their mother who was only entitled to dower, was held to throw doubt upon the title : *Maskell and Goldfinch*, (1895) 2 Ch. 525.

Where the title to the property, the entirety of which the vendor contracted to sell, depended on a devise of the testator's "undivided moiety," &c., and "all his other shares, proportions, and interest, if any, in the premises," the title was held to be doubtful, as the words of the will raised a suspicion that the testator was not entitled to the whole : *Stapylton v. Scott*, 1809, 16 Ves. 272.

Fraud on
power.

In the absence of some ground for supposing that an appointment was a fraud on the power the Court assumes that everything was done rightly : per James, L. J., in *Palmer v. Locke*, 1881, 15 Ch. D. 294. In that case, an appointment by father to son by will of 5,000*l.* was upheld, although six weeks after the will the father executed a bond binding himself that the son should receive either out of the father's property or out of the fund subject to the power 5,000*l.* at the least.

Where the property was settled to the use of A. for life, remainder to the use of A.'s wife for life, remainder to the use of such one or more of their children as A. should appoint, and A. having six children appointed the whole to his eldest son and then sold the property, the conveyance to the purchaser purporting to be made in consideration of 8,000*l.* paid to A., A.'s wife, and the eldest son, the Court presumed that the purchase money was properly divided between them according to the interests they had in the estate, and that the appointment was not fraudulent : *M'Queen v. Farquhar*, 1805, 11 Ves. 467. In a similar case, where the property was settled in the same way, and A. having seven children appointed the whole to the eldest daughter and then mortgaged for a sum expressed to be paid to him, his wife, and the eldest daughter, the Court presumed the *bona fides* of the appointment and mortgage, and held that the purchaser was bound to complete notwithstanding a notice by the younger children (alleging, however, no further facts) that the appointment was fraudulent : *Green v. Pulsford*, 1839, 2 Beav. 70. Even where there had been previous fraudulent appointments under the same power, this did not raise the suspicion of

fraud in the appointment then under consideration : *Carver v. Richards*, 1860, 1 D. F. & J. 548.

The title was held to be bad or doubtful where it depended on the validity of an appointment by a father to his daughter aged twenty-one, who immediately mortgaged the sum appointed and went out to the Cape with her father and the rest of the family, the mortgage money going to pay not only for her outfit and passage money, but for that of the whole family also : *Warde v. Dixon*, 1859, 28 L. J. Ch. 315. In that case it was said that there was not merely suspicion, as in *M'Queen v. Farquhar*, but "grave doubt" or "presumptive proof" that some of the money went into the father's pocket.

Where there was conflicting evidence as to whether, in granting of a lease under the Settled Land Act, the tenant for life had been influenced by the abandonment by the lessee of a claim for damages against the tenant for life, the Court refused to force the title on the purchaser : *Hardman and Wilcox*, (1902) 1 Ch. 599.

The presumption of *bona fides* is strengthened by lapse of time : *Re Postlethwaite*, 1888, 37 W. R. 200.

The vendor's title is not necessarily rendered doubtful by the mere fact that one link in it consists of a voluntary conveyance, which (before the Voluntary Conveyances Act, 1893) might possibly have been defeated by a subsequent conveyance for value by the grantor : *Noyes v. Patterson*, (1894) 3 Ch. 267 (where the grantor had died nearly seven years before the sale, and the grantee had afterwards conveyed for value). The purchaser is entitled in such a case to evidence, such as a statutory declaration by the grantor's solicitor that possession has been held consistently with the title and that the settlement has not as far as he knows been avoided : *Marsh and Granville*, 1883, 24 Ch. D. p. 19.

Voluntary
conveyance.

Where the vendor's title depended on the *invalidity* of a prior voluntary conveyance, the Court declined to presume in favour of the vendor that no subsequent consideration has made the voluntary settlement good : *Clarke v. Willott*, 1872, L. R. 7 Ex. 313. Such a presumption was, however, made in *Butterfield*

v. *Heath*, 1852, 15 Beav. at p. 414 (disapproved on another point in *Foster and Lister*, 1877, 6 Ch. D. 87).

If the vendor was himself the grantor of the voluntary conveyance, the Court not only refused specific performance (*Smith v. Garland*, 1817, 2 Mer. 123), but ordered the vendor to repay the deposit : *Clarke v. Willott*, *ubi sup.* See above, p. 187, and see *Briggs and Spicer*, (1891) 2 Ch. 127, stated above, p. 193. If, however, the purchaser was a willing purchaser, specific performance was decreed : *Peter v. Nicolls*, 1871, 11 Eq. 391.

Act of bankruptcy.

Where the vendor, to facilitate the sale, made an assignment, which, being an assignment of the whole of his property, amounted to an act of bankruptcy, it was held that the vendor was bound to prove that he had no creditor who could take proceedings in bankruptcy against him, and as it was impossible to prove this negative the title was held to be doubtful : *Loues v. Lush*, 1808, 14 Ves. 547 ; *Pott v. Turner*, 1830, 4 Moo. & P. 551.

(2) *Law doubtful*

Law doubtful.

If the disputed point of law is a point covered by decision, then either (i) the prior decision may be adverse to the title, and the Judge who has to decide whether the title is marketable may think that decision wrong ; or (ii) the prior decision may be favourable to the title, and the Judge may think that decision wrong ; or (iii) there may be prior conflicting decisions on the point. The disputed point of law may (iv) be not covered by decision.

(i) *Prior Decision adverse to the Title*

Prior decision adverse.

An adverse decision of a Court of co-ordinate jurisdiction upon the same or a similar point makes the title doubtful (*sed qu. ?*) ; but a decision of an inferior Court does not.

Court of co-ordinate jurisdiction.

The law is not well settled as to the effect of an adverse decision of a Court of co-ordinate jurisdiction. The rule is thus stated by Lord Romilly, M. R., in *Mullings v. Trinder*, 1870, 10 Eq. 449, "Where there has been a decision adverse to the title or to the principle on which the title depends, which the Court is of opinion is wrong (of course, if the Court is of opinion that the decision is right, it is simply a bad title), the Court will not rely upon its own opinion against a decision already pro-

nounced, and will not enforce the title." This statement of principle is only *obiter dictum*, the actual decision being that a title is not rendered doubtful merely because a Court of co-ordinate jurisdiction, which itself considered the title in question, or a similar title, to be good, refused to force it on a purchaser. In *Fry on Spec. Perf.* p. 409, the rule as laid down in *Mullings v. Trinder* is given without query. And the rule was observed in *Rose v. Calland*, 1800, 5 Ves. 186, and *Hall v. Dewes*, 1821, Jac. 189, and also by Jessel, M. R., in *Collier v. Walters*, 1873, 17 Eq., see p. 260, until the Lords Justices gave him leave to consider the case as if he were not bound by the prior adverse decision.

In the following cases, however, the rule was not followed: *Russell v. Plaice*, 1854, 18 Beav. 21; *White and Hindle*, 1877, 7 Ch. D. 201 (where, however, the purchaser's counsel did not argue that the title was *doubtful*); *Osborne to Rowlett*, 1880, 13 Ch. D. 774.

In *Osborne to Rowlett*, although there had been a decision on a similar point (*Cooke v. Crawford*) which was adverse to the title, Jessel, M. R., decided that the title was good, on the ground that the adverse decision had been questioned in succeeding cases. It is instructive to observe that in *Morton and Hallett*, 1880, 15 Ch. D. 143, the Court of Appeal doubted whether Jessel, M. R., was right in declining to follow *Cooke v. Crawford*. This seems to show that after all the title was doubtful, and that the safer rule is to declare the title doubtful in all cases where there has been an adverse decision of a Court of co-ordinate jurisdiction. It is, however, only fair to add that in another case (*Collier v. Walters*, 1873, 17 Eq. pp. 260, 261) Jessel, M. R., at first held a title doubtful because of a prior adverse decision, although clearly of opinion that such decision was wrong, and then, when the Lords Justices allowed him to hear and decide the case unfettered by authority, the counsel for the purchaser both declined to argue in support of the decision, abandoning it as untenable.

If the decision of the Court of co-ordinate jurisdiction is merely that the title, or a similar title, is doubtful, the Judge himself thinking it good, but declining to force it on an unwilling

Title held doubtful by Court of co-ordinate jurisdiction.

purchaser, this is not a decision adverse to the title within the meaning of the above rule. In *Mullings v. Trinder*, 1870, 10 Eq. 449, Lord Romilly, M. R., compelled a purchaser to take a title which Turner, L. J., in *Pyrke v. Waddingham*, 1852, 10 Ha. 1, had refused to force on a purchaser, though he himself thought the title good. "If," adds Lord Romilly, "Lord Justice Turner had expressed an opinion unfavourable to the title, however much that might have surprised me, I should have considered it a case too doubtful to enforce specific performance against the purchaser." In a case like that of *Mullings v. Trinder*, the title could not really be said to be doubtful, because upon the last two occasions in which it was discussed in Court the opinions of the Judges were in favour of the title.

Inferior
Court.

An adverse decision of an inferior Court does not make the title doubtful (*Sheppard v. Doolan*, 1842, 3 Dr. & War. 1), especially on a point of construction of a general statute: see per Cozens-Hardy, L. J., in *Handman and Wilcox*, (1902) 1 Ch. at p. 609.

Turner, L. J., in *Cook v. Dawson*, 1861, 3 De G. F. & J. 127, does not in any way dissent from this proposition when he says, that if the Judge of the Court below has pronounced the title to be bad, the Court of Appeal will not force the title on the purchaser unless the case is "clear to demonstration." There is a *dictum* of Wood, V.-C., in *Hamilton v. Buckmaster*, 1866, 3 Eq. at p. 328, that "the Court of Appeal has always held that the simple expression of doubt in the Court below is sufficient to prevent the title from being forced upon a purchaser"; and there is a decision of the Court of Appeal (*Collier v. McBean*, 1865, 1 Ch. 81) refusing to force the title on a purchaser because the Judge appealed from decided it was bad; but these must now be considered to be overruled by *Beioley v. Carter*, 1869, 4 Ch. 230, and *Alexander v. Mills*, 1870, 6 Ch. 124: per Jessel, M. R., in *Collier v. Walters*, 1873, 17 Eq. at p. 260. *Radford v. Willis*, 1871, 7 Ch. 7; *Cooper v. Kynock*, *ibid.* 398; and *Hutchings to Burt*, 1888, 59 L. T. 490, are also instances of decisions of the Court of Appeal that the title is good, although the Judge in the Court below thought it bad or doubtful.

(ii) *Prior Decision favourable to the Title*

(a) A prior favourable decision of a Court of co-ordinate jurisdiction on the same or a similar point will not make the title good if the Judge thinks that decision wrong: *Mullings v. Trinder*, 1870, 10 Eq. 449. Prior decision favourable.

(b) If there has been a prior favourable decision which the Judge thinks right, the title is good, not doubtful (*sed qu.?*).

The second of the above propositions appears to be involved in the larger proposition contained in *Alexander v. Mills*, 1870, 6 Ch. 124 (see below, p. 208), which case, however, is much shaken by the remarks of Lord Selborne in *Palmer v. Locke*, 1881, 18 Ch. D. 381. The exception in *Alexander v. Mills*, of points of construction of particular ill-drawn instruments (a case in which it is not likely that there would be a prior decision, as no two ill-drawn documents are alike) is an exception which need not be made in rule (ii) (b), as the prior favourable decision, coupled with the opinion of the Judge that that decision is right, would, it is submitted, make the title free from doubt. Further doubt is thrown on the correctness of the second of the above propositions by the remarks of Turner, V.-C., in *Collard v. Sampson*, 1853, 4 D. M. & G. 226. The learned Judge there doubted "whether a point of this nature," the construction of a general Act of Parliament, "can, for such a purpose as we have here to deal with, be considered to be settled by a single decision; and at all events I think that the Court, before it could, as against a purchaser, hold a point to be settled by a single decision must be satisfied that the decision rests upon grounds open to no doubt or question."

(iii) *Prior Decisions conflicting*

If there are prior decisions of authority co-ordinate with or superior to that of the Court which has to decide the point, and these decisions are conflicting, the title would seem to be doubtful, unless (*qu.?*) the more modern authority is favourable to the title, and the earlier conflicting decision is generally considered to be wrong. Prior decisions conflicting.

In *Palmer v. Locke*, 1881, 18 Ch. D. 361, Lord Selborne says :
 “ When you have a question raised upon the construction of a general statute, if there is any reasonable ground for saying that that question is not determined by previous authorities, or that the previous authorities are conflicting, then, in the terms of Lord Justice Turner’s judgment in *Pyrke v. Waddingham*, that cannot be treated as a question of general law so settled as to exclude that kind of question which the Court has paid regard to when it sees there is a doubtful question of title which cannot be forced on a purchaser.”

Where there are conflicting decisions, the Court looks at the present state of the authorities : *Eno v. Eno*, 1847, 6 Ha. at p. 177.

Where a prior decision favourable to the title has been doubted by subsequent Judges, the title is probably doubtful : see *Cook v. Dawson*, 1861, 3 D. F. & J. at p. 130.

An exception made or distinction drawn by the more recent decision does not of itself make it conflict with the former decision. Thus, in *Clayton and Barclay*, (1895) 2 Ch. 212, Chitty, J., considered that the decision of the Court of Appeal in *Cohen v. Mitchell*, 1890, 25 Q. B. D. 267, that an undischarged bankrupt may, until his trustee intervenes, deal for value with his subsequently acquired property, still applied with unshaken force to leaseholds, although the case of *New Land &c. and Gray*, (1892) 2 Ch. 138, distinguished *Cohen v. Mitchell*, and held it doubtful whether an undischarged bankrupt could so deal with his subsequently acquired real estate.

Prior conflicting decisions of inferior Courts do not make the title doubtful : *Carter and Kenderdine*, (1897) 1 Ch. 776.

(iv) *Point not covered by Decision*

Dicta.

If the point is one not covered by previous decision, it may be made doubtful by “ *dicta* of weight, which show that another Judge or another Court having the question before it might come to a different conclusion ” : per Chitty, J., in *Thackwray and Young*, 1888, 40 Ch. D. at p. 39.

Opinion of
counsel.

The adverse opinion of a conveyancing counsel does not make the title doubtful : *Hamilton v. Buckmaster*, 1866, 3 Eq. 323.

It is true that in *Marlow v. Smith*, 1723, 2 P. Wms. 198, Jekyll, M. R., said: "There being the opinion of learned men against the title, I will not compel the purchaser to accept the purchase"; but the opinion of the Judge himself in that case was against the title. So the adverse opinion of a writer of a text-book does not make the title doubtful: *Wyman v. Carter*, 1871, 12 Eq. 309. On the other hand, the favourable opinion of a counsel of eminence does not render the point free from doubt. In *Pyrke v. Waddingham*, 1852, 10 Ha. 1, the title had been accepted by an Equity Judge while in practice advising on behalf of mortgagees. The fact that the vendor's own professional adviser in answer to the purchaser's requisition admitted the correctness of the purchaser's construction of the will, which was adverse to the title, was treated as a reason for not forcing the title on the purchaser: *Ashton v. Wood*, 1857, 3 Sm. & G. 436.

If the point is one of known difficulty, or one known to be a moot point amongst conveyancers, the title is doubtful: per Romilly, M. R., in *Mullings v. Trinder*, 1870, 10 Eq. at p. 454. Moot point.

Apart from cases of known difficulty, cases of doubt which have never been the subject of judicial decision may be divided into two classes according to their subject-matter:

(a) Where the doubt is respecting the existence of an alleged rule of law or equity, or the construction of a public general Act of Parliament.

(b) Where the doubt is respecting the construction of some document other than a public general Act of Parliament.

(a) *Rule of law or construction of public statute.*

(a) Rule of law.

With regard to the first class it may be suggested that it is in the power of the Court to remove the doubt by deciding one way or the other, since a point of general law, when once decided, is settled law, and it is perfectly immaterial between what parties the question arises, as the decision would be binding on all Courts of co-ordinate or inferior jurisdiction. "As a general and almost universal rule the Court is bound, as much between vendor and purchaser as in every other case, to ascertain and determine, as it best may, what the law is, and to take that to be the law which it has so ascertained and determined. The exceptions to this will probably be found to consist not in

pure questions of legal principle, but in cases where the difficulty and the doubt arise in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument": *Alexander v. Mills*, 1870, 6 Ch. at p. 131. The authority of this case is, however, somewhat shaken by *Palmer v. Locke*, 1881, 18 Ch. D. 381. In *Collard v. Sampson*, 1853, 4 D. M. & G. 226, Turner, V.-C., even doubted whether the construction of a general statute could be considered sufficiently settled by a single prior decision, so as to enable the Court to force the title on the purchaser; for a contrary view, see *Bell v. Holby*, 1873, 15 Eq. at p. 193, per Malins, V.-C.

If the point is obscure and difficult, and a claimant adverse to the vendor gives notice that he will not consider himself bound by the Judge's decision, the title ought not to be forced on the purchaser: *Hollis Hospital and Hague*, (1899) 2 Ch. 540.

The authorities leave the question extremely doubtful, but on the whole the following rule seems to be gaining ground: the Court will force the purchaser to accept the title if the point alleged to be doubtful is a point of general law not covered by prior decision, or the construction of a public general Act of Parliament not previously determined, and the Court itself is favourable to the title.

Examples.

A title depending on the power of executors under a charge of debts to sell real estate within twenty years, without proving that any debts remain unpaid, was forced on a purchaser, though the period during which executors could sell without such proof had not previously been fixed by law: *Tanqueray-Willaume and Landau*, 1882, 20 Ch. D. 465.

In *Beioley v. Carter*, 1869, 4 Ch. 230, the Court decided in the vendor's favour a point of construction arising on the Leases and Sales of Settled Estates Act.

In *Bell v. Holby*, 1873, 15 Eq. 178, the Court decided in the vendor's favour a point of construction arising on the Fines and Recoveries Act, s. 32, which had not before been decided, or even discussed by text-writers: *Vide ibid.* pp. 187, 188.

In *Re Cooper and Allen*, 1876, 4 Ch. D. 802, Jessel, M. R., decided a point arising on the Succession Duty Act which had not been before decided, although the Crown was not before

him, and therefore was not bound by his decision : *Ibid.* p. 827. And the learned Judge's decision was nearly thirty years later overruled : *Northumberland v. Att.-Gen.* (1905) A. C. 406.

A title depending on the question whether an undischarged bankrupt can, before his trustee intervenes, convey for value freeholds acquired by the bankrupt subsequently to his bankruptcy is too doubtful to be forced on a purchaser : *New Land &c. and Gray*, (1892) 2 Ch. 138. But a title depending on the validity of an assignment for value by an undischarged bankrupt of subsequently acquired leaseholds was forced on a purchaser in *Clayton and Barclay*, (1895) 2 Ch. 212.

(b) *Point of construction.*

A point of construction arising on a well-drawn instrument, and involving a question of general law applicable to all similar instruments, will be decided by the Court. If the point of construction arises on some ill-expressed and inartificial instrument, or depends on some special context, the Court will generally, unless the matter is quite free from doubt, refuse to decide the construction in favour of the vendor, and will declare the title too doubtful to be forced on the purchaser : *Radford v. Willis*, 1871, 7 Ch. 7 ; and *Alexander v. Mills*, 1870, 6 Ch. 124.

(b) Point of construction.

The construction of a private or local Act is governed by the same rule ; if the Act contains an ambiguity not likely to occur in another private Act or document, the Court refuses to force the purchaser to accept a title depending on its construction ; *e.g.* where an Act empowering trustees to sell, in one part excepted certain land, and in another part included it : *Lincoln v. Arcedeckne*, 1844, 1 Coll. 98.

A will directed a settlement so as to secure an estate to certain persons in succession. Under the decree of the Court in a suit for the execution of the trusts of the will a settlement was approved by the Master and executed. This settlement contained a power of sale, and the estate was sold under this power. It was held that the purchaser could not be forced to take a title depending on the validity of the power : *Wheate v. Hall*, 1809, 17 Ves. 80. Cf. *Wise v. Piper*, 1880, 13 Ch. D. at p. 855.

The Court has decided in favour of the vendor :

That a right of pre-emption given by a local Act to " the

persons of whom the lands were purchased ” is limited to the actual vendors of such lands, and does not extend to their heirs or assigns : *Highgate Archway Co. v. Jeakes*, 1871, 12 Eq. 9.

The construction of a clause in a will fixing the time within which an option to purchase must be declared : *Austin v. Tawney*, 1867, 2 Ch. 143.

The question whether a power of sale implied a power to give valid receipts discharging the purchaser from seeing to the application of the purchase money : *Balfour v. Welland*, 1809, 16 Ves. 151.

On the other hand, the Court refused to decide whether a power of sale to trustees, “ with the consent in writing of my sons and daughters,” could, after the death of any of them, be validly exercised with the consent of the survivors : *Sykes v. Sheard*, 1863, 2 D. J. & S. 6.

The Court considered a title doubtful which depended on the construction of the words “ with all right and title to the same ” following a gift to A., by will made before the Wills Act, of various freehold estates and a leasehold estate, which words, the vendor argued, applied to all the properties, and not merely to that immediately preceding them, so as to give A. the fee in the freeholds : *Sharp v. Adcock*, 1828, 4 Russ. 374.

The Court refused to decide the question whether the exception of “ what is hereinafter mentioned and devised ” included leaseholds, there being nothing else specifically devised in the will (*Sheffield v. Mulgrave*, 1795, 2 Ves. jun. 526), and the question whether the words “ all my hereditaments in the kingdom of England ” included an estate in Wales (*Okeden v. Clifden*, 1826, 2 Russ. 309), and the question whether an executory limitation over of leaseholds was void for remoteness : *Burnell v. Firth*, 1867, 15 W. R. 546.

If the case is quite free from doubt, the Court will decide the construction of special words in an ill-drawn instrument.

The Court decided, in favour of the vendor, that the words “ All my worldly estate and effects ” in a will included real estate (*Hamilton v. Buckmaster*, 1866, 3 Eq. 323) ; also that the words “ And it is my will and request that they ” (testator’s daughters) “ shall not sell or dispose of any part of my said

freehold or leasehold premises," were not sufficient to restrain one of such daughters from alienating the property during her coverture : *Hutchings to Burt*, 1888, 59 L. T. 490.

Even in the case of an ill-drawn instrument the Court will decide a point of construction if it can be clearly determined by the application of a well-established rule or principle. Thus the effect of a devise (before the Wills Act) without words of limitation, followed by a gift over in case of the death of the devisees under twenty-one, was determined in *Burke v. Annis*, 1853, 11 Ha. 232.

Another instance is *Guyton and Rosenberg*, (1901) 2 Ch. 591.

III. PURCHASER'S RIGHT TO GOOD TITLE EXCLUDED BY HIS KNOWLEDGE OF THE DEFECT

In the absence of express agreement as to title, if the purchaser knew of a defect in the title, and knew that it was irremovable, he cannot refuse to complete because of that defect : *Ellis v. Rogers*, 1885, 29 Ch. D. 661. See below, p. 213, as to cases where the vendor expressly agrees to give a good title.

Purchaser's knowledge of defect.

Knowledge of a removable defect will not preclude the purchaser from requiring its removal or objecting to complete if it is not removed : see *Barnett v. Wheeler*, 1841, 7 M. & W. 364 (where, however, there was an express agreement to give a good title). But if the purchaser has admittedly given a much lower price on account of the defect he probably could not in an action of specific performance require the vendor to remove the defect : per Romer, L. J., in *Higgett and Bird*, (1903) 1 Ch. 287. And in the case of a sale by one partner to another, where the title is as much within the purchaser's knowledge as within the vendor's, the purchaser cannot obtain compensation for a defect in that title—*e.g.* where property treated as freehold turned out to be copyhold : *Hopcraft v. Hopcraft*, 1897, 76 L. T. 341.

In order that the purchaser should be precluded by his knowledge from objecting, it is essential that he should have knowledge not only of the existence of the defect, but of the vendor's inability to remove it : per Kay, J., in *Ellis v. Rogers*, 1885, 29 Ch. D. at p. 666.

Irremovable defect.

Where the purchaser, together with the vendor and another person, were entitled to a leasehold colliery, and the vendor agreed to assign his share in the colliery, the purchaser was held to be affected with notice of the lessor's title and precluded from objecting to it: *Phipps v. Child*, 1857, 3 Drew. 709.

On a contract for a lease, the intending lessee, if he knows that the lease is in excess of the lessor's power, is not entitled to partial performance: *Lawrenson v. Butler*, 1802, 1 Sch. & L. 13.

On an open contract which did not specify the vendor's interest, the purchaser, who knew what that interest was, was held unable to object to the title on the ground that the vendor had only a leasehold interest: *Cowley v. Watts*, 1853, 17 Jur. 172.

Where husband and wife agree to sell the wife's interest, the purchaser cannot, in case of the wife's refusal to complete, compel the husband to convey his interest with compensation for the wife's non-concurrence: *Castle v. Wilkinson*, 1870, 5 Ch. 534.

Restrictive
covenants.

Knowledge by the purchaser of restrictive covenants is not knowledge of an irremovable defect, if the purchaser thinks that the covenants have been discharged: *Ellis v. Rogers*, 1885, 29 Ch. D. 661.

Knowledge by the purchaser of leaseholds that the property was liable to forfeiture because of a breach of a covenant to repair, is not knowledge of an irremovable defect, because the lessor might waive the forfeiture by a subsequent receipt of rent, or agree to receive rent or execute a release: *Barnett v. Wheeler*, 1841, 7 M. & W. 364 (where there was an express agreement to give a good title); *Highett v. Bird*, (1903) 1 Ch. 287 (which is to be read as if there had been an express agreement to make a good title: *Allen v. Driscoll*, (1904) 2 Ch. at p. 231).

Express
agreement.

An express statement that the vendor has a good title, or an express agreement that he will give a good title, negatives the notice or knowledge of the purchaser of any defect in the title: see below, p. 213.

IV. CONDITIONS AS TO TITLE GENERALLY

(1) *Conditions enlarging the Purchaser's Right*

Where the contract is made "subject to the approval of the title by the purchaser's solicitor," these words would probably be construed as meaning "nothing more than a guard against its being supposed that the title was to be accepted without investigation; as meaning, in fact, the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser": per Lord Cairns, in *Hussey v. Horne-Payne*, 1879, 4 App. Ca. at p. 322. But in *Hudson v. Buck*, 1877, 7 Ch. D. 683, where the contract was "subject to the approval of the title by B.'s solicitor," it was held that the approval or disapproval of B.'s solicitor was, in the absence of bad faith or unreasonable conduct, conclusive as to the goodness of the title shown.

"Approval by solicitors."

A condition enabling the purchaser to rescind "in case the title shall not be satisfactory to the purchaser, his heirs or assigns, or his or their counsel," only entitles the purchaser to make reasonable objections to the title: *Lord v. Stephens*, 1835, 1 Y. & C. Ex. 222. So, deducing title "to the satisfaction of counsel" means reasonable satisfaction of counsel: *Gordon v. Mahoney*, 1849, 13 Ir. Eq. Rep. 383.

An express agreement that a good title shall be shown, or that certain persons will convey, or an express statement that the vendor has a good title, negatives the effect of the purchaser's knowledge or notice of a defect in the title; or, as it is sometimes put, parol evidence of the purchaser's knowledge or notice is inadmissible to contradict the written contract: *Cato v. Thompson*, 1882, 9 Q. B. D. 616; *Gloag and Miller*, 1883, 23 Ch. D. 320.

Defect known to purchaser.

If the vendor agrees to make "a good marketable title to be approved by the purchaser's solicitor," the purchaser may refuse to complete on the ground that there are restrictive covenants affecting the property, even though the purchaser knew at the time of the contract that there were such covenants, and that it was extremely difficult, and almost impossible, to obtain a release of them: *Cato v. Thompson*, *ubi sup.*

If the vendor asserts, as a distinct fact, that he has a right to sell, a statement, in one of the conditions, of facts which show that the vendor had not a good title will not preclude the purchaser from requiring the vendor to make a good title : *Johnson v. Smiley*, 1853, 17 Beav. at p. 233.

So where the conditions, after stating that the property was settled to such uses as the vendor and his wife should appoint, went on to state that "the vendor would procure a proper assurance to be executed by all necessary persons," and the vendor's wife, who was life tenant, afterwards refused to convey, the Court held that the purchaser was entitled to partial performance by the vendor (who was entitled in fee in reversion), with compensation in respect of the interest of the vendor's wife : *Barker v. Cox*, 1876, 4 Ch. D. 464.

But where A. agreed to procure the surrender to B. of an existing under-lease, which was, as B. knew, vested in C., then upon A.'s failure to procure a surrender, the Court held B. was not entitled to any relief, because there was no representation by A. that he was able to procure the surrender : *Beeston v. Stutely*, 1858, 27 L. J. Ch. 156.

Where on a sale of copyhold property the vendor agreed that he would endeavour to enfranchise the property, and deduce a good title as freehold, the purchaser was held not to be able to object to the title on the ground that the enfranchisement reserved the mines to the lord of the manor : *Kerr v. Pawson*, 1858, 25 Beav. 394.

The false representation of the vendor's agent that the vendor has a good title will not entitle the purchaser to relief, unless made fraudulently : *semble*, *Hume v. Pocock*, 1866, 1 Ch. at p. 385.

The false statement of the vendor's agent, that the vendor has a good title, affords the purchaser no ground for relief, if the purchaser is buying the vendor out in order to prevent his opposition to a private bill, and is really indifferent whether the vendor has a good title or not : *Ibid.*

(2) *Conditions restricting the Purchaser's Right*

A condition employed by the vendor with the view of restricting the purchaser's right to a good title may fail of its object

either (i) through not definitely stipulating that the purchaser shall not *object* to the title, or not stipulating that the purchaser shall not take the particular objection which in the event he does take ; or (ii) through not giving the purchaser sufficient information as to the defect which he is precluded from objecting to ; or (iii) through being misleading or containing some statement of fact which is untrue or which the vendor is unable to prove ; or (iv) through the vendor having no title at all.

It will be seen that in cases coming under the heading (i) the condition fails, because it does not in terms preclude the objection or requisition ; and it is to be observed that here the condition fails altogether ; not only will the vendor be unable to enforce specific performance, but the purchaser will be able to recover his deposit and expenses. In such cases the purchaser is not seeking to escape from his bargain ; he complies with the condition, but the condition is not aptly worded for the vendor's purpose. In cases coming under the other three heads, however, the failure of the condition is due to the Court treating it as unfair, or misleading, or oppressive. In these last-mentioned cases, the condition fails to this extent—that the vendor cannot enforce specific performance unless he waives the benefit of the condition ; but if the condition is aptly worded to cover the purchaser's objection, then in the absence of fraud the condition will succeed to the extent of preventing the purchaser from recovering his deposit or expenses : *Scott and Alvarez*, (1895) 2 Ch. 603.

Distinction
between (i)
and (ii)–(iv).

(i) *Condition not covering the objection*

The condition may fail because it merely mentions the defect in title, without saying that the purchaser shall not make any requisition or objection in respect thereof ; or because it precludes the purchaser from making requisitions on or inquiries of the vendor without precluding him from making inquiries *aliunde* ; or because it requires the purchaser to “assume” or “admit” facts without precluding him from objecting in case the facts turn out otherwise ; or because it requires him to accept certain evidence without making that evidence “conclusive” ; or because it precludes the purchaser from requiring

(i) Condition
not covering
the objection

a conveyance from a person entitled, but does not preclude the purchaser from objecting that that person is entitled ; or because, though it mentions all other possible objections, and precludes the purchaser from taking them, it omits to mention the precise objection which the purchaser takes. In all such cases, unless the vendor removes the objection, the purchaser not only cannot be forced to complete, but will be able to recover his deposit and expenses.

Mere statement of objection.

A mere statement of a possible objection to the title is not sufficient. If the vendor wishes to preclude the purchaser from taking the objection, he must state in the condition that the purchaser shall not take the objection.

Thus, the condition, "notwithstanding sect. 3 of the Disused Burial Grounds Act, 1884, which renders it unlawful to erect any buildings upon such grounds, except for certain purposes, the vendors believe that they are entitled under sect. 5 of the same Act to sell the property as building ground," does not exclude the objection that under that Act the land cannot be built on: *Trustees of St. Saviour's Rectory and Oyler*, 1886, 31 Ch. D. 412.

Rule of *aliunde*.

A condition that the purchaser shall not "require" the vendor to deduce the title, or part of the title, or shall not make any "inquiry" of the vendor as to the title, will not preclude the purchaser from objecting to a defect in the title, if he can discover the defect without requisition or inquiry of the vendor. Where such a condition is used, the purchaser is merely prevented from exercising his ordinary right of asking the vendor to deduce and prove the title ; if he discovers a defect in the title he may object, as the condition does not say he shall not *object* to the title. Such a discovery is often called a discovery *aliunde*—i.e. from some other source than the vendor's answers to requisitions. A discovery *aliunde* includes information obtained by the purchaser from third parties, or through searching at the registry (*Davys to Saurin*, 1886, 17 L. R. Ir. 334), or disclosed by the abstract of title (*Phillips v. Caldcleugh*, 1868, L. R. 4 Q. B. 159), or appearing in a deed forming part of the title (*Waddell v. Wolfe*, 1874, L. R. 9 Q. B. 515), or given by the vendor himself (*Smith v. Robinson*, 1879, 13 Ch. D. 148),

or obtained by discovery in an action (*Jones v. Watts*, 1890, 43 Ch. D. 574). As regards discovery, it may be observed that a purchaser, defendant in an action for specific performance, has only the same right of discovery as an ordinary litigant; he cannot obtain discovery of the plaintiff's title deeds dated before the time fixed for the commencement of the title, by a mere denial of the plaintiff's title, or by a vague general allegation—*e.g.* that the property is subject to restrictive covenants: *Jones v. Watts*, *ubi sup.*

If the condition expressly binds the purchaser not to make any objections in respect of the earlier title, then a discovery *aliunde* of a defect in the earlier title will not enable the purchaser to object to the title, except in case of the condition giving insufficient information, or being misleading, or the vendor having no title at all—and even then the condition will bind the purchaser to the extent of preventing him from recovering his deposit.

The following conditions have been held to be conditions of the first kind, and only to preclude the purchaser from making requisitions upon the vendor: Examples.

“The vendor shall not be obliged or compelled to produce, prove, or show the lessor's title”: *Blake v. Phinn*, 1847, 3 C. B. 975.

“The vendor shall not be obliged to produce the lessor's title”: *Shepherd v. Keatley*, 1834, 1 C. M. & R. 117.

“The purchaser shall not call for the lessor's title”: *Madeley v. Booth*, 1848, 2 De G. & S. 718.

“The lessor's title shall not be questioned, nor the vendor bound to go behind the same”: *Geoghegan v. Connolly*, 1859, 8 Ir. Ch. R. 598.

“The purchaser shall not require proof or production of the lessor's title”: *Darlington v. Hamilton*, 1854, Kay, 550. In that case Page-Wood, V.-C., overstates the rule when he says, “Whatever may be the terms of the condition of sale, if the purchaser obtains information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist upon the objection.” See per North, J., in *National Provincial Bank of England and Marsh*, (1895) 1 Ch. at p. 197. “Require.”

The condition, "no requisitions to be made in respect of the title prior to the conveyance of the 12th May, 1869," does not preclude the purchaser from requiring proof of the discharge of judgment mortgages of an earlier date, which he has himself discovered by searching the register: *Davys to Saurin*, 1886, 17 L. R. Ir. 334.

In *Spratt v. Jeffery*, 1829, 10 B. & C. 249, the vendor agreed to sell leaseholds, "as he holds the same," and the purchaser agreed to buy "without requiring the lessor's title": it was held, that the purchaser could not avail himself of an objection to the lessor's title to enable him to recover his deposit. This decision can only be upheld on the ground that the words "as he holds the same" are equivalent to "with such title as the vendor has": per Lush, L. J., in *Phillips v. Caldcleugh*, 1868, L. R. 4 Q. B. 159. It does not seem to be a sufficient distinction between *Spratt v. Jeffery* and the cases in which the Court has construed the word "require" as meaning "require from the vendor," that in the latter cases the vendor was suing for specific performance, but in *Spratt v. Jeffery* the purchaser was seeking to recover his deposit. The construction of the condition must be the same in both cases. *Spratt v. Jeffery* is disapproved of by Malins, V.-C., in *Harnett v. Baker*, 1875, 20 Eq. 55; and also in *Shepherd v. Keatley*, 1834, 1 C. M. & R. 117. Knight-Bruce, V.-C., in *Duke v. Barnett*, 1846, 2 Coll. at p. 341, says *Spratt v. Jeffery* and *Shepherd v. Keatley* are reconcilable; so, too, Parker, V.-C., in *Hume v. Bentley*, 1852, 5 De G. & Sm. at p. 525, adding, however: "It might possibly be that in *Spratt v. Jeffery* the Court had erred in construing the contract as importing an acceptance of the lessor's title without objection."

"Inquired into."

The condition, "the lessor's title will not be shown and shall not be inquired into," was held to preclude the purchaser from objecting to the title even in respect of defects discovered *aliunde*: *Hume v. Bentley*, 1852, 5 De G. & Sm. 520.

"Requisition or inquiry."

The condition, "no requisition or inquiry shall be made respecting the title of the lessor," was held not to preclude objections discovered *aliunde*: *Waddell v. Wolfe*, 1874, L. R. 9 Q. B. 515. In *Waddell v. Wolfe*, it was thought from the context

that "inquiry" meant inquiry of the vendor—*i.e.* requisition—and had not such a wide sense as in *Hume v. Bentley*.

A condition that the earlier title shall not be "required or inquired into" by the purchaser does not preclude the purchaser from objecting to a defect accidentally disclosed by the vendor: *Smith v. Robinson*, 1879, 13 Ch. D. 148.

A condition precluding the purchaser from investigating the earlier title does not preclude him from objecting to a defect in that title disclosed by the abstract itself: *Taylor v. Martindale*, 1842, 1 Y. & C. C. C. 658.

The condition, "the title shall commence with an indenture dated, &c., and the prior title, whether appearing in any abstracted document or not, shall not be *required, investigated, or objected to*," was held to preclude the purchaser from recovering his deposit on the ground of a defect in the prior title: *National Provincial Bank and Marsh*, (1895) 1 Ch. 190. "Objection."

Restrictive covenants affecting the property at the date fixed for commencement of title and still affecting the property may be objected to, although contained in a deed prior to the commencement of the title: *Phillips v. Caldecleugh*, 1868, L. R. 4 Q.B. 515; *Cox and Neve*, (1891) 2 Ch. 109; *Nisbet and Potts*, (1906) 1 Ch. 386. In these cases the purchaser is not objecting to the earlier title, he is objecting that the title given is itself incumbered. In *Phillips v. Caldecleugh* the deed forming the root of title mentioned the covenants in question. In *Cox and Neve* and *Nisbet and Potts* the purchaser discovered them *aliunde*.

A condition restricting the abstract of the title to leasehold property to the lease itself and a specified assignment and the title subsequent to that assignment, and stipulating that the purchaser "shall not make any objection or requisition in respect of the intermediate title notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignees a good title for the residue of the said term," is sufficient to bind the purchaser to complete notwithstanding his discovery (from the vendor) of facts that throw doubt upon the title: *Scott and Alvarez*, (1895) 1 Ch. 596.

It is to be noted that the statutory condition (Conv. Act, 1881, s. 3 (3)) precludes the purchaser from making any objection to the title prior to the date fixed by the contract for the commencement of title.

A condition that the purchaser shall accept such title as the vendor has, though it will not enable the vendor to obtain specific performance if he has no title at all (see below, p. 235) may suffice to preclude objections short of the objection that the vendor has no title at all: *Freme v. Wright*, 1819, 4 Mad. 364. There the assignees of a bankrupt sold "under such title as he lately held the same, an abstract of which may be seen, &c.," and the purchaser was held unable to insist upon any other title than the bankrupt had. Specific performance was decreed at the vendor's instance, which Page-Wood, V.-C., considered a stretch of the jurisdiction of the Court: *Edwards v. Wickwar*, 1865, 1 Eq. at p. 70.

The condition that the purchaser shall have "such title as they (the vendors) have received from Lord Oxford," does not entitle the purchaser to inquire what title the vendors received, or to object that the conveyance from Lord Oxford was executed only a year before the contract: *Wilmot v. Wilkinson*, 1827, 6 B. & C. 506.

But the right to require the vendor to prove the lessor's title (in cases before the Vendor and Purchaser Act, 1874) was not precluded by an agreement to sell "the interest of the vendor" in the land: *Wright v. Griffith*, 1851, 1 Ir. Ch. R. 695; *Fennell v. Anderson*, *ibid.* 706.

An agreement for a lease contained an option for the lessee to purchase, and an agreement by the lessee "in case of such purchase and conveyance as aforesaid, to accept the title of E. (the lessor) without dispute." Upon exercising the option, the lessee's assignee objected to the title on the ground that upon the release (executed prior to the agreement) of an incumbrance affecting that and other property, the property in question was not included, and the legal estate was outstanding. It was held that the objection was precluded by the condition: *Duke v. Barnett*, 1846, 2 Coll. 337.

The condition that the purchaser shall take such title as the vendor has does not override a condition stipulating that the

vendor shall deliver an abstract, and that the purchaser shall make his requisitions within a certain time. The latter condition imports that the purchaser may object to the title; for, as Turner, V.-C., said, "If the purchaser is not to have any title, what is the use of his taking objections?" *Keyse v. Haydon*, 1853, 1 W. R. 73. However, on further consideration, Wood, V.-C., held that the purchaser was not entitled to an absolute title, but merely to some *bonâ fide* title, the best in the vendor's power: 1 W. R. 112. The condition binding a purchaser to accept such title as the vendor has does not absolve the vendor of his duty of preparing an abstract; the purchaser, though compelled to accept the title, whatever it may be, is entitled to require the vendor to show him what the title is. Nor does such a condition absolve the vendor from his duty to procure and hand over the title deeds: *Duthy and Jesson* (1898), 1 Ch. 419.

Under a contract to sell "only such right or interest, if any, as the vendor may have," the vendor is bound to convey his right or interest, free from an existing incumbrance: *Goold v. Birmingham, &c.* 1888, 58 L. T. 560 (but *qu.?*).

On a sale of copyholds under the conditions, "the vendors to give *such title as they now possess* to extend over a period of twenty years," the vendors were held bound not only to convey their equitable title, but also to give the purchaser a surrender of the legal estate: *Whiteley v. Taylor*, 1876, 35 L. T. 187.

The force of the words "assume" and "admit" in a condition of sale is not clearly settled by authority. The words may mean either "shall not require the vendor to prove," or "shall not object even if the facts are otherwise": it is submitted the latter is the correct meaning.

'Assume.'
'Admit.'

In *Best v. Hamand*, 1879, 12 Ch. D. 1, a condition that the purchaser should "assume and admit" certain facts, which the purchaser afterwards discovered to be incorrect, was held to bind him, at least to the extent of precluding him from recovering his deposit.

In *English v. Murray*, 1883, 49 L. T. 35, there was a condition that certain specified indentures of lease and release "contain no express mention of the said three undivided thirtieth shares

of J. N., of and in the coal and minerals under the said lands . . . nevertheless P. shall assume that the same shares passed by the same indentures." Before completion, the vendor discovered and informed the purchaser that, in 1739, the said shares in the minerals had been conveyed to some one else, so that the vendor had no title to them. It was held that the purchaser could not rescind, because he was precluded by the condition, but compensation was granted under another condition.

Where the condition was, "the purchaser shall assume that A. C. was, at his death, beneficially entitled to the property in fee simple free from incumbrances," the fact being that A. C. had contracted to purchase the property from persons whose title to sell was doubtful, the purchaser was relieved, partly on the ground that the condition was misleading, and partly on the ground that the condition only precluded the purchaser from requiring the vendor to prove the fact : *Harnett v. Baker*, 1875, 20 Eq. 50. Malins, V.-C., said there (p. 57) that *Hume v. Bentley* (1852, 5 De G. & Sm. 520) might have applied had the condition been that the fact "should not be questioned," apparently construing "shall assume" as "shall not require the vendor to prove."

If the vendor knows of facts inconsistent with the assumption which he requires the purchaser to make, the condition is misleading, and the vendor could neither enforce specific performance, nor retain the deposit.

"Conclusive evidence."

It would seem but for the cases of *Else v. Else* and *Howell v. Kightley*, mentioned below, that a condition making anything "conclusive evidence" of a fact is sufficient to bind the purchaser, even if the fact turns out otherwise; except that if the vendor *knows* that the facts are otherwise, he will not be able to enforce specific performance, or retain the deposit.

A condition making the last receipt for rent "conclusive evidence" of the performance of the covenants (nothing being said in the condition about waiver of breaches) was considered sufficient, even though the purchaser proved that the covenant had been broken : *Bull v. Hutchens*, 1863, 32 Beav. 615.

And in *Osborn v. Osborn*, 1870, 18 W. R. 421, Malins, V.-C., speaking of a condition that the title should commence with a

deed dated 8th April, 1858, to which the purchaser objected, because the persons conveying were a waterworks company, which only had power to convey under certain circumstances, said: "It would have been better if the condition had been more stringent, and had gone on to say that the deed should be *conclusive* evidence of the vendor's title to convey; in which case the purchaser would have had no right to object to the title, even if he had discovered a flaw *aliunde*."

But a condition making recitals twenty years old "sufficient and conclusive evidence" of the documents and facts recited did not preclude the purchaser from showing that a recital of a will was inaccurate: *Else v. Else*, 1872, 13 Eq. 196.

And it was said that the words "possession under the lease shall be deemed conclusive evidence of the due performance or sufficient waiver of any breach of the covenants in the lease," would not be sufficient if it were proved that the landlord intended to enforce the forfeiture: per Romilly, M. R., in *Howell v. Kightley*, 1856, 21 Beav. at p. 333.

It would seem that notwithstanding a condition binding the purchaser to accept certain evidence, the purchaser is entitled to better evidence if the vendor has any; and if not, to a statutory declaration by the vendor that he has no better evidence in his possession: see *Bird v. Fox*, 1853, 11 Ha. at p. 48. Better evidence.

A condition precluding the purchaser from requiring the conveyance to be executed by any other person than A. B., does not preclude him from objecting to the title on the ground that A. B. has no power of sale, and cannot give a good title. Such a condition is intended only to govern the rights of the vendor and purchaser in relation to the conveyance itself: *Molyneux and White*, 1884, 15 L. R. Ir. 383. Conveyance.

A condition that "as the vendors purchased the property with money in which they had no beneficial interest, no other covenant shall be required than the usual covenant that they have not incumbered, and no objection shall be taken to the right of the vendors to hold, sell, or convey the property," was held to preclude the purchaser from objecting that the vendors were only trustees of a freehold land society or requiring the concurrence of the persons beneficially interested: *Lethbridge v.*

Kirkman, 1855, 25 L. J. Q. B. 89. See, too, *Groom v. Booth*, 1853, 1 Drew. 518.

On a sale by trustees during the life of A., until whose death they had no power of sale, the condition, "The children of A., or the assigns and trustees of such of them as have aliened or settled their estates and interests, shall, if required, join in the conveyance to the purchaser, and the purchaser shall not object to the vendor's title on the ground that the sale is taking place in the lifetime of A.," will not preclude the purchaser from objecting to the title if any of the trustees of A.'s children are incompetent to concur, not having any power of sale. The condition implies that it would be of some use to have the concurrence of these parties, which is not true : *Mosley v. Hide*, 1851, 17 Q. B. 91. See further, on conditions as to concurrence of third parties, the cases set out on p. 348 below.

The condition may fail through not mentioning every objection the purchaser can possibly take ; it may point out and preclude the purchaser in respect of ninety-nine objections, and he may succeed in finding out the hundredth objection and take it.

A condition that the vendor shall deliver to the purchaser certain deeds "which are all the title deeds in the vendor's possession," does not entitle the vendor to say that the purchaser must take only such title as appears on those deeds : *Dick v. Donald*, 1827, 1 Bl. N. S. 655.

The condition, "the several lots were by post-nuptial settlement, dated 1888, conveyed by the vendor to D., subject to certain trusts therein. The said deed was a voluntary deed. The recital therein of an ante-nuptial agreement is contrary to the fact. The vendor will make a declaration that the said recital is untrue, and the said deed purely voluntary. The purchaser, on the tender of such declaration, shall be bound to assume that the said settlement was a purely voluntary one on the vendor, his wife and children, and therefore inoperative, and shall not be entitled to require the consent of the grantee therein, or any other person to this sale," was held not to preclude the purchaser from requiring proof that the settlement had not been made good by subsequent consideration : *Small v. Torley*, 1890, 25 L. R. Ir. 388.

The condition, "the vendors are the only children of K. The purchaser shall not require any evidence of this fact or of the death of K.," is not sufficient to preclude the purchaser from objecting that there was a succession on K.'s death in respect of which, the property being subject to leases, there might be further succession duty payable at a future date: *Kidd and Gibbon*, (1893) 1 Ch. 695.

On a sale of property subject to a lease, there was a condition, "all purchasers will buy subject to and admit the validity of the leases stated in the particulars." The particulars stated a lease dated 1876. On the investigation of the title there appeared a lease, dated 1850, for three lives, one of which was still in existence. No surrender of the lease of 1850 could be found, but since 1866 no rent had been paid and no claim made thereunder. The purchaser recovered his deposit on the ground that, though the condition bound him to admit the validity of the lease of 1876, it did not bind him to admit the existence of every matter which might be a condition precedent to its validity: *King v. Chamberlayn*, 1887, W. N. 158.

A condition that the purchaser "shall be satisfied with a declaration of the seisin of G. in fee simple, free from incumbrances," does not preclude the purchaser from requiring further evidence, if the only declaration offered is merely that the declarant had "heard and believed that G. became possessed of the premises as the sole and absolute owner thereof, in fee simple," making no mention of incumbrances: *Nott v. Riccard*, 1856, 22 Beav. at p. 313.

A vendor of copyholds, who had been admitted by the lord without any surrender by the previous tenant, sold under a condition that "no earlier title should be deduced anterior to the last copy of the court roll, the purchaser should not be at liberty to question the right of the lord of the manor to grant such copy." This condition was held to be insufficient to preclude the purchaser from recovering his deposit on the ground that, owing to the non-surrender, the legal estate was outstanding: *Sellick v. Trevor*, 1843, 11 M. & W. 722.

The statement, "the vendor's title is accepted by the purchaser," does not preclude the purchaser from objecting that

the lease under which the vendor holds contains onerous covenants of which the purchaser had no notice: *Haedicke and Lipski*, (1901) 2 Ch. 666. The condition failed altogether, and the purchaser recovered his deposit and expenses.

(ii) *Condition not sufficiently clear*

Condition
clear.

If a condition does not give the purchaser sufficient information as to the defect which he is precluded from objecting to, the condition may fail to the extent of enabling the purchaser to resist specific performance unless the condition is waived. But if the condition is aptly worded to cover the defect, then, though it does not give sufficient information, the condition will succeed to the extent of enabling the purchaser to recover his deposit. See *Nottingham, &c. v. Butler*, 1886, 16 Q. B. D. 778.

It is difficult to extract from the cases any principle or general rule as to the vendor's duty to impart information as to his title.

Defect known
to vendor.

It is usually in cases of a defect known to the vendor or his advisers that the question has arisen, but it has been said that a vendor cannot escape from the necessity of fairly disclosing the defect in his title by omitting to make himself acquainted with his deeds, or by forgetting their contents: per Wills, J., in *Nottingham, &c. v. Butler*, 1885, 15 Q. B. D. at p. 271. This, however, may well be doubted, as conditions are often employed (and successfully employed) for the express purpose of enabling the vendor to neglect the examination of his title.

In discussing the duty of the vendor to give the purchaser sufficient information to enable him to judge whether he will run the risk of taking a defective title it may be useful to distinguish between special conditions and general conditions—that is to say, between conditions which, on the face of them, are specially framed to meet some defect known to the vendor and the innocent-looking common form conditions usually employed whether the defect covered by them is known to the vendor or his advisers or not.

The question whether a general condition covering a defect in title is sufficient to preclude the purchaser from refusing to complete on the ground of that defect appears to depend on the

nature of the defect, and also in certain cases on the vendor's knowledge or ignorance of the defect. But the authorities are conflicting.

In the case of mortgages a general condition would not (nor Mortgages. would even a special condition mentioning the mortgages : see *Torrance v. Bolton*, 1872, 8 Ch. 118) enable the vendor to compel the purchaser to complete and to buy instead of the fee a mere equity of redemption. If the vendor intends to sell subject to a mortgage, he must mention the mortgage in the particulars.

If the vendor or his advisers are aware of any restrictive Restrictive covenants. covenants, the vendor cannot by employing a general condition that "the property is sold subject to all tenancies, easements, . . . and to any matter or thing affecting the same," prevent the purchaser from objecting to complete on the ground of the restrictive covenants : *Nottingham, &c. v. Butler*, 1886, 16 Q. B. D. 778. But in the absence of any misrepresentation or misleading statement, the condition will be sufficient to preclude the purchaser from recovering his deposit : *Ibid.*

In the case of easements which may be classed as "patent Easements. defects" no condition at all is necessary, unless the land is described as "building land" or some other statement is made inconsistent with the existence of easements. In the case of easements which are "latent defects," it is submitted that a general condition will suffice, even if the vendor knows of the easement, at any rate in the case of such easements as underground rights of waterway and drainage. *Heywood v. Mallalieu*, 1883, 25 Ch. D. 357, where, notwithstanding a general condition as to easements, the purchaser recovered his deposit on the ground of the existence of an easement known to the vendor, is not an authority to the contrary, as in that case statements were made in the auction room, by the vendor's solicitor and the auctioneer, which the Court considered misleading.

A general condition as to stamps will, it is submitted, suffice Stamps. in the case of a deed executed before the 17th of May 1888 being unstamped or insufficiently stamped ; the purchaser will have to complete even if the vendor or his advisers knew the deed was not properly stamped.

Middlesex.

A general condition as to non-registration in Middlesex will bind the purchaser even if the vendor knows of an unregistered will: *Girling v. Girling*, 1886, W. N. 18.

Special
conditions.

It is difficult to lay down any rule as to the amount of information which the vendor must give to the purchaser in a special condition. It might have been laid down that if a condition is obviously framed to cover a defect in title known to the vendor, then, provided the condition is aptly worded to cover the defect and is not misleading, the condition will be sufficient even if it does not state the exact defect which it is framed to cover or the nature of the defect: see *Sandbach and Edmondson*, (1891) 1 Ch. 99, stated below. But a different rule is often laid down. Lord Romilly in *Beioley v. Carter*, 1869, 4 Ch. at p. 234 (note), says, "Where the vendor wishes to preclude the purchaser from taking a particular objection to the title which must appear on the documents submitted to him, it is essential that the vendor should, as a matter of good faith, point out, if not the objection itself, the nature of the objection in the conditions of sale." Similarly, in *Cruse v. Nowell*, 1856, 25 L. J. Ch. 709, Kindersley, V.-C., speaks of the principle that wherever a purchaser is to be limited as to his rights respecting the title by some special condition, that condition ought to be expressed in such language as to show distinctly to what extent he is to be affected." In *Cruse v. Nowell* (see statement of the case below, p. 233), the condition was actually misleading, so it was not necessary to decide whether it conveyed sufficient information to the purchaser.

The condition, "the purchaser shall assume that B. died intestate, and without an heir, before the year 1870," cannot be objected to as insufficiently clear simply because it does not inform the purchaser that, if the facts were otherwise, the vendor would have no title: *Sandbach and Edmondson*, (1891) 1 Ch. 99.

The condition, "Lot 3 was formerly held with other property under a lease dated January 31, 1672, for a term of 500 years at a yearly rent of 1s., but the property was assigned in 1828 free from the said rent which has never been paid by the vendor, and the purchaser shall assume that the said rent has been released. By a deed poll in 1902 the property was expressed to

be enlarged into a fee simple. . . . It shall be assumed that the deed-poll operated as an effectual enlargement," is not misleading, even if in several deeds between 1828 and 1902 the property was described as held at a rent of 1s. : *Bluiberg v. Keeves*, (1906) 2 Ch. 175.

Where on the sale of an improved ground rent the conditions provided that no objection should be taken to the sub-lease being in excess of the term of the superior lease, and inspection of the leases was offered, the condition was held to be clear enough, although the purchaser was not told that the fact of there being no reversion would prevent him from having any right of distress : *Smith v. Watts*, 1858, 4 Drew. 338.

The condition, "no objection or requisition shall be made by the purchaser by reason of the non-acknowledgment of an indenture, dated 1841, by a married woman, who was a party thereto," was held insufficient to preclude the purchaser from refusing to complete, on the ground that the married woman was entitled to one-fifth of the property absolutely, so that through such non-acknowledgment the vendor has no title at all to one-fifth of the property : *Cumming to Godbolt*, 1884, 1 Times Rep. 21. The vendor ought "to have stated expressly that he had no title to one-fifth" : *Kay, J., ibid.* Compare cases where vendor has no title at all.

A condition stated that the property (which was leasehold) was being sold by a trustee for sale under a will, and that the legatee for life had been in possession for twenty-three years, and concluded, "the purchaser shall not be entitled to require any further evidence of the assent of the testator's executors to the bequest made by the will of the leaseholds, and the fact of such assent shall be admitted by the purchaser." This condition was held to be sufficient to preclude the purchaser from objecting that the administratrix *de bonis non* of the testator claimed, as the vendor knew, to have the power of selling the leaseholds : *Jackson v. Whitehead*, 1860, 28 Beav. 154.

The condition, "the Judge having seen fit to order a sale of the reversion, notwithstanding several infants are interested therein, the jurisdiction of the Court to make such order shall not be questioned, nor shall any objection or requisition be

made on account of such order," is sufficient, even if there may be a doubt as to the jurisdiction: *Nunn v. Hancock*, 1871, 6 Ch. 850.

A condition stating that the will under which the vendors are executors does not contain any power of granting leases, but the executors have, with the concurrence of the life-tenant, granted leases, and continuing, "no objections or requisitions shall be made in respect of such leases having been granted, and the purchaser shall take subject to such interests as the tenants may be entitled to under the same," is sufficient, although the vendors have been guilty of a breach of trust in granting the leases: per Knight-Bruce, L. J., *Micholls v. Corbett*, 1865, 3 D. J. & S. 18.

Mortgages.

A condition mentioning certain mortgages to which the property is subject, and stipulating that the purchaser shall purchase and the property will be conveyed subject to the mortgages, will not bind the purchaser to complete if the mortgages are not mentioned in the particulars and the purchaser does not know he is purchasing subject to them: *Torrance v. Bolton*, 1872, 8 Ch. 118. And if the vendor describe the property in such a way as actively to mislead the purchaser as by describing the equity of redemption to a reversion as "an immediate absolute reversion," the purchaser will further be entitled to recover his deposit: *Ibid.*

Condition
shortening
title.

If the condition, though not a general condition, is one not obviously framed to cover a defect, as where a condition stipulates that less than a forty years' title shall be given, the condition must be explicit.

"The test of its being fair and explicit is whether it discloses all facts within the knowledge of the vendor which are material to enable the purchaser to determine whether or not he will buy the property, subject to the stipulation, limiting his right to the ordinary length of title": per Cotton, L. J., in *Marsh and Granville*, 1883, 24 Ch. D. at p. 24. If the condition makes the title commence with a deed less than forty years old, "it is most material for enabling a purchaser to decide whether he will enter into such a contract that he should know whether the deed was upon a transaction in which there would be an investigation of the title": *Ibid.* p. 25.

A condition providing that "no objection or requisition should be made in respect of the under-lease of 1852, or of any derivative interest created thereout, or of any under-lease or tenancy prior to the said under-lease of 1864," was held insufficient to preclude the purchaser from making requisitions in respect of another under-lease prior to 1864, which the vendor knew of but did not mention: *Edwards v. Wickwar*, 1865, 1 Eq. 68. "It was plainly the duty of the parties to disclose the under-lease, and it would be most mischievous to allow a vendor to suppress facts known to him affecting the title, and yet compel a purchaser to accept it": per Page-Wood, V.-C., *ibid.* See further as to leases, pp. 52-55, above.

The vendor as a rule sufficiently informs the purchaser of a defect in his title appearing on a document if he refer the purchaser to that document for information in such a way as to show that it is important for the purchaser to look at the document in order to see what sort of title he will get, and offers him every facility for inspection. See, further, p. 246, below.

Reference to document.

The Court takes into account the capacity of the purchaser in estimating whether a condition was sufficiently clear to inform him of the real state of the title. Thus, in *Minet v. Leman*, 1855, 7 D. M. & G. 340, at p. 352, Knight-Bruce, L. J., considered that a condition was clear enough to preclude the purchaser, who was "an experienced and able member of the legal profession"; and in *Williams v. Wood*, 1868, 16 W. R. 1005, Romilly, M. R., said: "The conditions of sale have been very carefully framed, and the facts are correctly stated, and so stated as to lead a practised lawyer to the legal inference that no title was shown in the vendor, but they are drawn in a way which would not lead an ordinary purchaser to this conclusion."

Purchaser's capacity.

If the purchaser notices or has his attention called to the fact that the conditions are framed with a view to cover defects in title, he cannot afterwards complain that the conditions are stringent.

Purchaser's attention called.

Where the purchaser asked, "Can a good and marketable title be made?" and the vendor's solicitor replied that it could under the existing conditions, it was held that this was sufficient to call the purchaser's attention to the stringent nature of the

conditions, and he was not allowed to resist specific performance on the ground that the conditions were oppressive: *Hyde v. Dallaway*, 1842, 6 Jur. 119.

(iii) *Misleading conditions*

(iii) Condi-
tion mislead-
ing.

If a condition is misleading or contains or implies a statement of fact which is untrue or which the vendor is unable to prove, it will fail to the extent of enabling the vendor to resist specific performance. But such a condition, if aptly worded to meet the purchaser's objection, will succeed to the extent of precluding the purchaser from recovering his deposit, unless, indeed, the misleading words or the untrue statement contained or implied in the condition are untrue to the vendor's knowledge.

A condition that the purchaser shall "assume" or "admit" things which to the vendor's knowledge are untrue is a misleading condition, and if such a condition is used and not waived the purchaser will be entitled to resist specific performance: *Re Banister*, 1879, 12 Ch. D. 131.

In *Best v. Hamand*, 1879, 12 Ch. D. 1, the vendor agreed to sell land which he had purchased from a railway company as surplus land. The agreement contained a stipulation that the purchaser "should assume and admit that everything (if anything were necessary) had been done by the company to enable them to sell and effectually convey the said pieces of land as surplus lands, and should not call for or require the production of any evidence to that effect." The purchaser subsequently discovered that no offer had been made by the company to the original or adjoining owners as required by the Lands Clauses Act, 1845, s. 128, and that two of such owners had not waived their right of pre-emption. The Court of Appeal, reversing Hall, V.-C., held that the purchaser was bound by the stipulation to admit the company's title to sell to the vendor, and the purchaser was unable to recover his deposit. It was not suggested in that case that the vendor knew that the facts, which the purchaser had to assume, were untrue.

The condition that "a statement in a specified deed that a life annuity granted to A. had not been paid or claimed for

eight years previously, and a declaration by the vendor that he believes that the same has not been claimed for the last twenty years, shall be conclusive evidence of the fact of such annuity having determined," was held to be misleading, the fact being that the annuity was granted for four lives, two of which were subsisting, and the property, the subject of the sale, being a reversion, the annuity charged on it could not have been claimed during the periods mentioned in the condition: *Drysdale v. Mace*, 1854, 5 D. M. & G. 103 (suit for specific performance).

A condition stating that C. had mortgaged to P., and that P. had transferred the security to N., and that P. had afterwards, in exercise of his power of sale, sold to N., and continuing, "the purchaser shall admit that this sale was well made under the power in the mortgage deed, although the mortgagor or his assignees (in case he was then bankrupt or insolvent) did not concur therein," will not enable the vendor to obtain specific performance if the purchaser objects to the title on the ground that P. had no power of sale, having, by his transfer to N. of the mortgage, transferred the power of sale also: *Cruse v. Nowell*, 1856, 25 L. J. Ch. 709. The language of the condition was misleading, as it implied that P. had a power of sale: *Ibid.*

In the absence of express stipulation, the purchaser may require evidence of any fact stated in a condition restricting his right to call for the title: *Symons v. James*, 1842, 1 Y. & C. C. C. 487. And if an untrue statement of a material fact is made in the conditions, the vendor cannot force the title on the purchaser: *Ibid.* But though the statement is untrue, the purchaser cannot recover his deposit if the condition meets his objection, unless the statement was untrue to the vendor's knowledge (see above). Thus, in *Corrall v. Cattell*, 1839, 4 M. & W. 734, where the conditions mentioned an indenture alleged to have been executed by the vendor, and stated that the vendor had declared that it was a forgery, but stipulated that the purchaser should not make any objection on account of the alleged indenture, in an action to recover the deposit the jury found that the indenture was not a forgery, but the action failed. In this case, indeed, the vendor actually obtained a decree for specific

Facts stated
in conditions.

performance : *Cattell v. Corrall*, 1839, 3 Y. & C. 413 (*sed qu.?*). See Sug. 340.

A condition that the purchaser shall require no further evidence of identity than that afforded by the abstracted documents, necessarily implies that the abstracted documents do afford some evidence of identity, and if that is not the fact the condition is misleading : *Flower v. Hartopp*, 1843, 6 Beav. 476 (specific performance refused). But if the vendor has not purposely misled the purchaser the latter may be precluded by such a condition from recovering his deposit : *Nicoll v. Chambers*, 1852, 11 C. B. 996. See below, pp. 251 to 254.

But a condition that the purchaser "should admit the vendor's heirship to the last owner upon a copy of his pedigree, and should not require any further evidence," was enforced, although the copy of the pedigree failed to trace the heirship : *Nash v. Browne*, 32 L. J. Ch. 148 (vendor's action for specific performance). This decision is open to serious doubt, because the condition implied that the copy of the pedigree showed the vendor's heirship, and the stipulation that the purchaser should not require any "further evidence" virtually asserted that the copy pedigree tended to prove the fact, that it was evidence up to a certain point.

If there are special conditions which show that the purchaser is only to have a good holding title, the purchaser cannot insist on more than a good holding title, even if he is relieved against the special conditions themselves on the ground that they are misleading : *Re Banister*, 1879, 12 Ch. D. at p. 145.

(iv) *Vendor having no title at all*

(iv) Vendor:
having no
title at all.

If the vendor has no title at all to the property, the Court will not enforce specific performance even though the defect in the title is covered by the conditions : *Scott and Alvarez*, (1895) 2 Ch. 603. As to purchaser suing for his deposit and expenses in such a case, see below, p. 237.

A title may be bad from a conveyancer's point of view, but good from a business man's point of view : per Lindley, L. J., in *Scott and Alvarez*, (1895) 2 Ch. at p. 613. If the title, though bad in the first sense, is good in the second sense, a good holding

title, the question whether the vendor can enforce specific performance will depend on the conditions. But if the title is bad in the sense that the purchaser will be "exposed to immediate eviction" (Lindley, L. J., *ibid.*), however explicit the condition may be, the Court will not, it seems, enforce specific performance of the contract.

In *Scott and Alvarez* the condition was that the purchaser should not object to the title intermediate between a certain lease and the assignment of it, but should assume that the assignment vested a good title in the assignee. It was afterwards discovered that the title was positively bad, that there had been a fraudulent concealment of a will, and a gross breach of trust. The Court, notwithstanding the condition, refused to decree specific performance.

Again, where the agreement for sale stipulated that the purchaser should assume that E. M., who died in 1841, was seised in fee, and should not require the production of or investigate or make any objection in respect of the prior title, and the prior title showed that the property belonged not to the vendor but to the purchaser in fee, subject to a lease to the vendor, specific performance was refused on the ground of "common mistake": *Jones v. Clifford*, 1876, 3 Ch. D. 779.

The condition, "the purchaser shall assume that N., daughter of R., is now dead; that R. had no other lawful issue, and that M., the widow of R., is now under the will of R. entitled to the grantee's interest in the said fee farm conversion grant," was held insufficient to enable the vendor to obtain specific performance, as M. took no estate at all under the will, or took an estate for life only: *McVicker's Contract*, 25 L. R. 1r. 307.

Other instances of the vendor having "no title at all" will be found below at pp. 270, 311, 359.

If the purchaser seeks to avoid a condition relating to the title on the ground that the vendor has no title at all, the burden of proving that the title is defective is on the purchaser, and it is not enough for him to show merely that the title is doubtful: *Scott and Alvarez*, (1895) 1 Ch. 596.

Even the condition that the purchaser shall take "such title as the vendor has" does not bind the purchaser to complete if

"Such title as the vendor has."

the vendor has no title at all: per Wood, V.-C., in *Keyse v. Hayden*, 1853, 20 L. T. o.s. 244. The words mean, shall take such title as the vendor can make out from the documents in his possession: *Ibid*.

Where "the interest if any of N." in certain chattels and leaseholds was sold by a person who knew that N. had no interest, with a condition that "even if it should appear that N. had no interest in the premises the purchaser should have no remedy against the vendor to compel him to refund," the sale was set aside on the ground of unfairness, the vendor knowing that the subject of sale *was* worthless, the purchaser merely knowing that it *might be* worthless: *Smith v. Harrison*, 1857, 26 L. J. Ch. 412.

Where the purchaser bought "the vendor's interest (if any)" under a lease and knew that the vendor's interest might be forfeited by the lessor, he was held to his bargain, although after he had paid the purchase-money, the vendor's interest was forfeited: *Griffin v. Caddell*, 1875, 9 Ir. R. C. L. 488.

H. agreed to sell P. all his estate, right, and interest in certain lands, "and H. shall be called upon to produce only the title from B. to himself." Both H. and P. knew that there were other claimants to the property beside B., but P. was anxious to buy B. out, in order to remove his opposition to a bill in Parliament affecting the land, and had induced H. to purchase B.'s interest. It was held that P. was not entitled to show *aliunde* that B.'s title was defective: *Hume v. Pocock*, 1866, 1 Ch. 379.

A. being tenant from year to year of a public house, agreed to let to B. "all his right, title, and interest," provided that, if B. should not be accepted as a tenant by F. and H., the superior landlords, subject to terms mentioned in the margin (which were, "F. and H. agree to grant B. a lease of thirty-five years, at 200*l.* rent"), the agreement was to be void. It was held that this amounted merely to an agreement by A. to sell such interest as he himself possessed, with a proviso avoiding the agreement if a valid lease were not obtained from F. and H.; it did not amount to a covenant by A. to procure a lease from

F. and H., and to make a good title : *Tweed v. Mills*, 1865, L. R. 1 C. P. 39.

On a sale of freehold land, together with a fee-farm rent of 21s. on other hereditaments, there was a condition that "no evidence should be required of the receipt, or payment, or existence of the ground rent of 21s., other than that disclosed by the conveyance to H., deceased, nor should any objection be taken to the title in consequence of the non-payment or non-receipt of the said rent." It appeared that the rent had not been paid for twenty years or more ; but the purchaser was held to his bargain : *Hanks v. Palling*, 1856, 6 E. & B. 659.

The fact that the vendor has no title at all will not enable the purchaser to recover his deposit, if the condition precludes him from objecting to the title : *Scott and Alvarez*, (1895) 2 Ch. 603. Recovering deposit.

Where on a sale in fee the purchaser discovered that the vendor's predecessor in title had only a life estate, and therefore that the vendors had no title to the property, he was held to be precluded from recovering his deposit because this was a defect occurring previously to the date stipulated for the commencement of title and was covered by a condition that the prior title should not be required, investigated, or objected to : *National Provincial Bank and Marsh*, (1895) 1 Ch. 190.

V. COMMENCEMENT OF TITLE

In the absence of express agreement, the purchaser is entitled (except in the cases mentioned below) to require a forty years' title commencing with a document which is a good root of title. See Vendor and Purchaser Act, 1874, s. 1.

A disentailing deed (Sug. 366), a conveyance under a trust for sale (1 Prest. on Abstr. 9), and (unless the Conveyancing Act, 1881, has made a difference in this respect, see below, p. 242) an appointment under a power, at least in cases where the power is not recited (1 Prest. on Abstr. 249), are not good roots of title. The purchaser is entitled to have the deed creating the entail, trust, or power produced for his inspection. Probably, however, if the deed were lost, proof of possession for a considerable time would make the title one which could be forced on a purchaser. See Sug. 366. Root of title

An inclosure award is not a good root of title : Sug. 373.

An admittance is not a good root of title without the surrender on which it is based (see *Doe d. Tunstill v. Bottrill*, 5 B. & Ad. 135), except in the case of admittance of a devisee under a will taking effect under the Wills Act.

A voluntary deed, if forty years old, may be a good root of title : per Cotton, L. J., in *Marsh and Granville*, 24 Ch. D. 11.

If the title begins with a general devise, proof of testator's seisin is necessary : *Parr v. Lovegrove*, 4 Drew. at p. 178.

The stipulation that the purchaser shall accept a possessory title is not sufficient to shorten the period of title which the purchaser may require : *Douglas, &c. v. L. & N. W. Ry. Co.*, 3 K. & Jo. 173. On an open contract it is not sufficient for the vendor to prove a possessory title for twelve years ; the purchaser may require a forty years' title by possession : *Jacobs v. Revell*, (1900) 2 Ch. 858 ; *Nisbet and Potts*, (1906) 1 Ch. at p. 411. A possessory title may be forced on a purchaser. See above, p. 194.

Advowsons.

In the case of advowsons, the purchaser is entitled to a hundred years' title or sixty years' with three presentations during that period : 1 Dav. 439.

Leaseholds.

On the sale of leaseholds, the title must commence with the lease, however old : *Frend v. Buckley*, 1870, L. R. 5 Q. B. 213. But the title subsequent thereto need not be traced for more than the forty years next preceding the contract of sale : *Williams v. Spargo*, 1893, W. N. 100.

If the lease is less than forty years old, then before the Vendor and Purchaser Act, 1874, the purchaser was entitled to call for the earlier—*i.e.* the lessor's—title. In the case of leases for lives or leases by copyholders the purchaser is still entitled to have a full forty years' title although the lease is less than forty years old. But in the case of a lease for years the purchaser or intending lessee is not entitled to call for the freehold title, and in the case of an under-lease for years the purchaser is not entitled to call for the title to the leasehold reversion. In the case of a contract to grant a sub-lease the intending sub-lessee is still entitled to call for the sub-lessor's title (*i.e.* the title to the leasehold reversion), but in the case of a contract

to grant a sub-sub-lease the intending sub-sub-lessee, though still entitled to call for the sub-sub-lessor's title—*i.e.* the title to the sub-leasehold reversion—is not entitled to call for the title to the superior leasehold reversion. The enactments are as follows :

“Subject to any stipulations to the contrary in the contract . . . under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold ” : Vendor and Purchaser Act, 1874, s. 2, rule 1.

“Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion ” : Conveyancing Act, 1881, s. 3 (1). “Where land sold is held by lease, the purchaser shall assume, unless the contrary appears, that the lease was duly granted ” : sect. 3 (4). “Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted ” : sect. 3 (5). Sect. 3 “applies only if and so far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained ” : sect. 3 (9). “On a contract to grant a lease for a term of years to be derived out of a leasehold interest with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion. This section applies only if and so far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained ” : Conveyancing Act, 1881, s. 3 (11).

Notwithstanding these enactments a purchaser (or intending lessee) may show *aliunde* (see p. 216) that the vendor's (or lessor's) title is bad : *Jones v. Watts*, 1890, 43 Ch. D. 574, and the vendor of a lease or under-lease or an intending sub-lessor must still show the lease or under-lease under which he holds : *Gosling v. Woolf*, 1892, 41 W. R. 106. According to the report of *Gosling v. Woolf* in (1893) 1 Q. B. 39, even on the sale of an under lease the purchaser may call for the title to the leasehold

reversion, but this is putting a wrong construction on sect. 3 (1). It would seem that the Conveyancing Act, 1881, s. 3 (4), binding the purchaser to assume the lease was "duly granted," is not sufficient to preclude him from requiring the execution thereof to be proved. A condition that the purchaser shall not require the production of any title prior to the lease under which the vendor holds, does not relieve the vendor of the duty of proving the execution of the lease: *Laythorpe v. Bryant*, 1836, 1 Bing. N. C. 421.

An agreement to deliver an abstract of title is a "stipulation to the contrary" within the Vendor and Purchaser Act, 1874, s. 2, and the lessee is entitled under such an agreement not only to have an abstract, but to have it verified in the usual way, and to have a covenant or acknowledgment for the production of the deeds abstracted: *Pursell and Deakin*, 1893, W. N. 152.

A condition on the sale of leasehold property that the purchaser shall take an under-lease but no abstract of the vendor's title shall be required, nor the lessor's title objected to or gone into, does not preclude the purchaser from requiring inspection of the lease to the vendor: *Allen v. Clark*, 1863, 11 W. R. 304.

On the sale of an under-lease before the Conveyancing Act, 1881, a condition that the purchaser shall not inquire into the title "prior to the lease by which the premises are held," was considered ambiguous, and the purchaser was held entitled to construe it as only precluding him from examining the title prior to the original lease: *Seaton v. Mapp*, 1846, 2 Coll. 556.

On an agreement by a copyholder to grant a lease, a stipulation that the lessee "should not require the title of the lessor to be produced," was construed as referring to the title of the lord of the manor, on the ground that if the title of the lessor was meant, the lessee would be bound to take a lease, even if the lessor had no title to grant one: *Hanbury v. Litchfield*, 1835, 2 My. & K. 629.

The condition that the purchaser "shall not call for the lessor's title," does not preclude him from objecting that the property sold is an under-lease, but has been described simply, as a "lease": *Madeley v. Booth*, 1848, 2 De G. & S. 718.

Under a contract to grant a lease and to grant a right of way to the land demised, the vendor is not bound to show his title to the easement : *Jones v. Watts*, 1890, 43 Ch. D. 574.

On the sale of a reversion, the title must commence with the deed creating the reversion, however old that deed may be : Dart, 335. On the sale of any property held under a grant from the Crown—*e.g.* tithes—the title must commence with the grant : Sug. 367. In such cases, though the title may have to commence with a deed older than forty years, the vendor is only bound to trace the subsequent title for the last forty years : *Ibid.*

Reversions.
Crown grants.

“Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then under a contract to sell and convey the freehold the purchaser shall not have the right to call for the title to make the enfranchisement” : Conveyancing Act, 1881, s. 3 (2). This sub-section does not make the title necessarily commence with the deed of enfranchisement. If a later deed is forty years old and a good root of title, the title will begin with the later deed. Nor does this sub-section alter the rule that if the enfranchisement is less than forty years old the previous copyhold title must be shown for a sufficient period : 1 Prest. Abstr. 205.

Enfranchised
copyholds.

“A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser ; nor shall he require any information, or make any requisition, objection, or inquiry with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title is recited, covenanted to be produced or noticed, and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document forming part of that prior title are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties,

Prior title.

and perfected, if and as required, by fine, recovery, acknowledgment, enrolment, or otherwise": Conveyancing Act, 1881, s. 3 (3).

It may be doubted whether this sub-section precludes the purchaser from objecting to a defect in title discovered *aliunde*. But the word "objection" in the earlier part of the sub-section would probably be construed as covering objections founded on such defects, except in the cases comprised in the later part of the sub-section, where the purchaser is to assume certain matters "unless the contrary appears."

Where the vendor purposely shortened the title to avoid abstracting a deed containing a restrictive covenant it was held that the purchaser who discovered the restriction *aliunde* was entitled to recover his deposit: *Cox and Neve*, (1891) 2 Ch. 109.

Where the root of title is an appointment under a power and the vendor does not state the nature of the deed forming the root of title, it is not clear whether the purchaser is precluded by this sub-section from objecting to the appointment as not a good root of title. We may take separately the two cases (1) where the appointment is more than forty years old; and (2) where, the appointment being less than forty years old, the vendor, by a special condition, makes his title commence with it, but omits to mention that it is an appointment. In the first case, it might be argued that the purchaser, who requires the abstract to commence with the deed creating the power, is not requiring an abstract of a deed made "before the time prescribed by law," because, in the case of appointments, the law does not prescribe a fixed period of forty years, but says the title shall commence with the deed creating the power; the date of that deed is, therefore, the "time prescribed by law." It seems a sufficient answer to this argument to say that, if it were allowed, no effect would be given to the words of the sub-section, which must mean something and make sense if "the time prescribed by law" is construed to mean forty years. But, in the second case, there appears to be more ground for arguing that, notwithstanding the sub-section, the purchaser could demand the abstract of the deed creating the power, on the ground that, in limiting the purchaser's length of title, the vendor ought to tell

him the nature of the deed with which the title is to commence, if that deed is one not usually regarded as a good root of title : see *Marsh and Granville*, 1883, 24 Ch. D. 11. This view is supported by sub-sect. (11), which says the statutory conditions are to be treated as similar express conditions would be apart from the Act. The difficulty is that it is inconceivable that a condition expressed in the very words of sub-sect. (3) would ever be employed, for a vendor would either omit all references to appointments under powers as not affecting his property, or would, instead of a vague reference as in sub-sect. (3), mention the fact that the root of title was such an appointment.

The fact that the deed with which the title is made to commence is a conveyance by a corporation which only had power to convey in certain circumstances, does not entitle the purchaser to question the competency of the corporation to convey or to require evidence that the circumstances under which alone they were empowered to convey existed at the date of the deed : *Osborn v. Osborn*, 1870, 18 W. R. 421. If, on the other hand, the purchaser had shown that these circumstances did not exist, he could have objected to the title : *Ibid*.

Conveyance
under limited
power.

“Where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title or evidence of the title to the lease. This section applies to leases made either before or after the commencement of the Act” : Conveyancing Act, 1882, s. 4.

Agreement
for lease.

“Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease or to the benefit thereof” : Settled Land Act, 1882, s. 31 (4).

The condition, “the vendor shall produce a good and marketable title to the premises commencing from the freeholder at his own expense, but no title or evidence of title shall be required to be produced or authenticated anterior to the date of the lease,” does not preclude the purchaser from inquiring as to dealings with the preliminary contract for the lease which have been brought to his notice by the vendor : *Rhodes v. Ibbetson*,

1853, 4 De G. M. & G. 787, where the contract had been mortgaged. This case was decided on the ground of want of clearness in the condition, but the decision might also be supported on the rule of *aliunde*, see p. 216.

Root of title showing incumbrances.

A condition that the abstract shall commence with a specified deed, and that no purchaser shall investigate or take objections in respect of the title prior to the commencement of the abstract, does not preclude the purchaser from taking the objection that the deed with which the abstract commences is a conveyance subject to certain covenants the nature of which is not explained by the vendor : *Phillips v. Caldcleugh*, 1868, L. R. 4 Q. B. 159.

Misleading condition.

A condition that the title shall commence with a specified indenture (dated less than forty years ago) is a misleading condition if the indenture is a voluntary revocable deed, and not so described : *Marsh and Granville*, 1883, 24 Ch. D. 11. But a condition, "the property having been taken in exchange under an award under an Inclosure Act the abstract will commence with the award," the fact being that the award was an allotment in lieu of rights of common and not an exchange, is not a misleading condition : *Cattell v. Corral*, 1840, 4 Y. & C. 228.

Notice.

A purchaser who is precluded by the conditions from requiring a full forty years' title has constructive notice of that which he would have known if he had required a full forty years' title and had investigated the title during that period—*e.g.* notice of an earlier vendor's lien (*Peto v. Hammond*, 1861, 30 Beav. 495); notice of a restrictive covenant in an earlier title deed : per North, J., in *Cox and Neve*, (1891) 2 Ch. at p. 118. Similarly, the purchaser of leaseholds has notice of defects in the lessor's title which he would have discovered if he had examined that title for the full period : *Robson v. Flight*, 1865, 4 D. J. & S. 608 ; and the law in this respect is not altered by the Vendor and Purchaser Act 1874 s. 2 (1) : *Patman v. Harland*, 1881, 17 Ch. D. 353. In the statement of the rule as to notice set out above, the length of title in the case of freeholds is given as forty years ; possibly it should be sixty years. There seems to be no reason why a different effect should be given to the enactment in the Vendor and Purchaser Act cutting down the purchaser's rights in the case of the length of the title from that

given to the enactment cutting down his rights as regards the lessor's title.

VI. TITLE TO REGISTERED LAND

The purchaser of land registered with a possessory title can require the same title prior to the first registration as he would be entitled to if the land were not registered. Subject to this, the purchaser of registered land cannot require any evidence of title except :

(i) the evidence to be obtained from an inspection of the register, or of a certified copy of, or extract from, the register.

(ii) a statutory declaration as to the existence or otherwise of matters declared by the Act not to be incumbrances, viz. :

- (1) liability to repair highways by reason of tenure, quit-rents, Crown rents, heriots, and other rents and charges having their origin in tenure ;
- (2) succession duty, land tax, tithe rent-charge, and payments in lieu of tithes or of tithe rent-charge ;
- (3) rights of common, rights of sheep-walk, rights of way, watercourses, and rights of water and other easements ;
- (4) rights (created previously to the registration of the land or to the 1st of January, 1898) to mines and minerals ;
- (5) rights (created previously to the registration of the land or to the 1st of January, 1898) of entry, search, and user, and other rights and reservations (created as before-mentioned) incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines and minerals, or of property in mines or minerals ;
- (6) rights of fishing and sporting, seignorial and manorial rights of all descriptions, and franchises exercisable over the registered lands ;
- (7) leases or agreements for leases and other tenancies for any term not exceeding twenty-one years, or for any less estate in cases where there is an occupation under such tenancies ; and
- (8) estate duty, liability to repair the chancel of any church, liability in respect of embankments, sea and river walls and drainage rights, customary rights, public rights and

profits *à prendre*, and, subject to the provisions of the Land Transfer Act 1897 (*qu.* sect. 12), rights acquired or in course of being acquired under the Limitation Acts.

(iii) evidence of title to incumbrances entered on the register ; and also,

(iv) in the case of land registered with a qualified title, the same evidence as to estates, rights, or interests, excluded from registration, as he would be entitled to if the land were unregistered : Land Transfer Act, 1897, sect. 16 (1.).

It is to be observed that the Act entitles the purchaser not to evidence that the liabilities, &c. mentioned above (ii) do not exist, but to a declaration “ as to their existence or otherwise ” ; this would be satisfied by a statutory declaration by the vendor that they existed. It is conceived, however, that the rights of the purchaser as to rescission or recovery of compensation for such defects in title are not affected by sect. 16 of the Act, as the section deals with *evidence* of title and does not purport to deal with the purchaser’s right to complain of a defect of title which is proved to exist.

VII. NOTICE OF DOCUMENTS

A condition referring the purchaser to a document and offering him reasonable opportunity of inspection, will affect him with notice of the contents of the document, so far as the contents consist of matters which it is sufficient to set out in the conditions and which do not require to be referred to in the particulars.

“ If a property is sold subject to the provisions contained in a deed which is specially referred to without any mention of its contents, and which deed can be examined before the sale by the purchaser, he is bound by everything contained in that deed ” : per Romilly, M. R., in *Cox v. Coventon*, 1862, 31 Beav. 378.

“ If the parties do not choose to look at documents placed before them to which they are referred, they cannot complain that they have not a perfect knowledge of the nature of the interest with which they are dealing ” : per Lord Cottenham in *Daves v. Betts*, 1848, 12 Jur. 709.

The condition “ the title shall consist of five several contracts, dated, &c., for the redemption of the land tax,” does not suffi-

ciently refer the purchaser to the contracts to fix him with notice of the contents. "It is not sufficient, in order to fix the purchaser with notice of the contents of a lease or other document, that such document is simply stated in the particulars or conditions to exist": *Cox v. Coventon*, *ubi sup.*

The proposition above stated is designedly restricted to matters which do not require to be stated in the particulars. It is conceived that an incumbrance would not be sufficiently brought to a purchaser's notice if it was mentioned in a document to which the purchaser was referred for information, even if the reference was contained in the particulars themselves: see *Torrance v. Bolton*, 1872, 8 Ch. 118.

But as regards leases the rule is sometimes stated more broadly. Thus in *Hall v. Smith*, 1807, 14 Ves. 426, Grant, M. R., said: "If the party has notice that the estate is in lease, he has notice of everything contained in the leases." But Wood, V.-C., in *Darlington v. Hamilton*, 1854, Kay, at p. 556, questioned whether the doctrine of notice extended to collateral facts stated in the lease.

A condition that the purchaser is to buy with full notice of "the indenture of lease under which the vendor holds," will not give the purchaser notice of the fact (which he might have discovered if he had inspected the indenture) that the vendor has only an under-lease: see *Broom v. Phillips*, 1896, 74 L. T. 459.

The mere mention of the superior lease is not sufficient to affect the purchaser with notice that the under-lease is an under-lease of part only of the property comprised in the head-lease: *Taylor v. Martindale*, 1842, 1 Y. & C. C. C. 658. Even the statement that the under-lease is a "derivative lease" is not sufficient to inform the purchaser that other property is comprised in the head-lease: *Bramfit v. Morton*, 1857, 3 Jur. N. S. 1198.

The case of the *Bank of Ireland v. Brookfield Linen Co.*, 1884, 15 L. R. Ir. 37, seems to conflict with the above cases, and if so is open to doubt. There, the purchaser of a sub-fee farm grant was held to be affected with notice of everything contained in the superior grant, and in particular with the fact that the land

was, with other land, subject to the payment of head rents and covenants, and provisos for re-entry.

Reference to a lease has been held to fix the purchaser with notice of the following matters contained in the lease :

The amount of the ground rent, and the terms of some special covenants : *Pope v. Garland*, 1841, 4 Y. & C. 394.

Covenants against noisome trades : *Grosvenor v. Green*, 1858, 28 L. J. Ch. 173 ; see, too, *Paterson v. Long*, 1843, 6 Beav. 590 (stated below, p. 426).

A power for the tenant to cut the timber and sell it : *Vignolles v. Bowen*, 1847, 12 Ir. Eq. R. 194.

A covenant against alienation without licence : *Vaughan v. Magill*, 1849, 12 Ir. Eq. R. 200 ; *Smith v. Capron*, 1849, 7 Ha. 185, where the purchaser saw the lease and an assignment thereof which was expressed to be made with the lessor's licence.

A purchaser of leaseholds, described as being held with others under one lease reserving rent, was held to have notice of a power of re-entry, which was contained in the lease and affected the whole of the premises : *Walter v. Maunde*, 1820, 1 Jac. & W. 181.

Mention of an annuity being charged on the property sold is sufficient notice of the existence of a term of years to secure such annuity : *Vaughan v. Magill*, 1849, 12 Ir. Eq. R. 207.

The stipulation that the property is sold subject to the restrictions " contained or referred to in and by " a deed of 1899, is sufficient to give the purchaser notice of an underground watercourse, the right to which was given by a deed of 1898, the deed of 1899 being a conveyance " subject to the conditions mentioned in the deed of 1898 " : *Childe and Hodgson*, 1906, 54 W. R. 234 (nothing said about opportunity of inspection).

If the vendor, in referring a purchaser to a document, states so much about the document as to raise the presumption that he has told all (or all that it is necessary for the purchaser to know) when he has not, the condition is misleading, and would not bind the purchaser if, in reliance on it, he omitted to look at the document : *Blenkhorn v. Penrose*, 1880, 43 L. T. 668. The following condition was there held to be sufficient : " The vendors derive their title under the will of B. In 1861, B. contracted

to purchase the houses from T., and a document under seal, dated 27 December, 1861, was executed by the parties. From 1861 to the present time (29 January, 1879), quiet undisturbed possession has been held of the said houses by B. and the vendors. . . . The said document can be seen at the office of the vendors' solicitors at any time previous to the sale, and the purchaser shall be deemed to have knowledge of the contents. The title shall commence with the said document. . . . The purchaser shall assume that B., by the said document, and by his undisturbed possession, was at the time of his death seised in fee of the houses." The document mentioned was only an agreement.

The purchaser is not fixed with notice of the contents of a lease or other document unless a reasonable opportunity of inspection is offered him : *Reeve v. Berridge*, 1888, 20 Q. B. D. 523 (sale by private contract) ; *White and Smith*, (1896) 1 Ch. 637 (sale by auction).

The same rule applies to the case of a contract to grant an under-lease : *Hyde v. Warden*, 1877, 3 Ex. D. 72.

The cases of *Hall v. Smith*, 1807, 14 Ves. 426 ; *Grosvenor v. Green*, 1858, 28 L. J. Ch. 173 ; *Pope v. Garland*, 1841, 4 Y. & C. 394 ; and *Bank of Ireland v. Brookfield Linen Co.*, 1884, 15 L. R. Ir. 37, so far as they conflict with the above authorities, must be taken to be now overruled. In *Cosser v. Collinge*, 1832, 3 M. & K., 283, it was said that a person who agrees to take an under-lease must know that he is to be bound by the covenants in the original lease ; but the intending lessee's solicitor there inspected the original lease.

Even a stipulation that the title is accepted does not preclude the purchaser from objecting to the covenants in a lease which the vendor has not given him an opportunity of inspecting : *Haedicke v. Lipski*, (1901) 2 Ch. 666.

The mere mention of a lease in the conditions or contract does not throw a duty on the purchaser to demand inspection of the lease, as it is, for all the purchaser knows to the contrary, possible that the demand would be refused : *Reeve v. Berridge*, 1888, 20 Q. B. D. 523.

It is not sufficient that the vendor should deposit his lease with his solicitors or the auctioneer, so as to be available for

inspection ; the conditions must state (or the purchaser be otherwise notified) that the lease can be inspected : *White and Smith*, (1896) 1 Ch. 637.

Time must be given for a deliberate examination : *Brumfit v. Morton*, 1857, 3 Jur. N. S. 1198. The vendor was held not to have given a sufficient opportunity of inspection when he offered the purchaser's solicitor inspection of a lease of adjoining property containing the same terms, and the purchaser's solicitor refused to look at it because he had no time then to do so, and the vendor made no further offer to show either the lease itself or the lease of the adjoining property : *Molyneux v. Hawtrey*, (1903) 2 K. B. 487. Where the conditions of sale are only read at the auction, and not disclosed before, this does not give a purchaser a reasonable opportunity of inspection : *Dougherty v. Oates*, 1900, 45 Sol. J. 119.

It might, however, be held that a purchaser was affected with notice of onerous covenants contained in the lease, if he knew of the existence of similar covenants in leases of adjoining portions of the same estate, and neglected to demand inspection of the lease : per Stirling, J., in *White and Smith*, (1896) 1 Ch. at p. 643. But the mere fact that similar covenants were frequent in leases of similar property in the neighbourhood would be insufficient to affect the purchaser with notice : *Midgley v. Smith*, 1893, W. N. 120.

VIII. IDENTITY

(i) *In the absence of Stipulation*

If there is any variation between the description of the parcels in the documents of title and the description contained in the particulars, or between the descriptions in the several documents of title *inter se*, the purchaser is, in the absence of stipulation to the contrary, entitled to evidence that the property sold is identical with or comprised in the parcels contained in the documents of title.

If the parcels are so loosely described in the documents of title as not to be capable of identification by means of the description alone, the purchaser may require evidence as to who was in possession of the property during the period covered by

the abstract of title, but he cannot refuse to complete merely on the ground of the vagueness of the description in the documents of title. See *Long v. Collier*, 1828, 4 Russ. 267, which was a case of copyholds, where the descriptions on the court rolls usually are vague ; but the same rule would probably apply to freeholds.

If the vendor describes the property as “partly freehold and partly leasehold,” or “partly freehold and partly copyhold,” he is under an obligation to show the purchaser the boundaries of the different kinds of land : *Monro v. Taylor*, 1850, 8 Ha. at p. 66. The purchaser cannot, in such a case, complain if the freehold portion is less than he expected ; all he can complain of is uncertainty as to the boundaries : *Ibid.* And it would seem that the vendor need not point to the precise boundary line : same case on appeal, 3 Mac. & G. 713 (but *qu. ?*).

The parcels in a lease were described by reference to a plan Plan. on the margin, which purported to be drawn to a scale of one chain to an inch, and gave the outline of the parcels, and stated that they contained 2 roods ; measured by the scale the plan showed that the parcels contained about $2\frac{1}{2}$ roods. On a sale of the leasehold parcels, together with the adjacent freeholds, the purchaser objected that the quantity of leaseholds was uncertain. The objection was disallowed on the ground that the lease afforded the materials for ascertaining the quantity of the leasehold parcels : *Monro v. Taylor*, 1852, 3 Mac. & G. 713. The decision would have been the same even if it had been of the utmost importance to the purchaser that the leaseholds should be 2, and not $2\frac{1}{2}$, roods, as all the vendor had represented was, that the estate was partly freehold and partly leasehold : *Ibid.* p. 720.

(ii) *Condition as to Identity*

A condition that “no further evidence shall be required than Condition. that afforded by the abstracted documents,” is a misleading condition, if the abstracted documents give no evidence at all of identity, or vary from the particulars or from each other in their description of the property. If such a condition is used, the purchaser would be able to resist specific performance, though not to recover his deposit.

The condition, "no further evidence of the identity of the parcels shall be required than what is afforded by the abstract or the deeds, instruments, or other documents therein abstracted," will not, in an action by the vendor for specific performance, preclude the purchaser from objecting that the description in the abstracted documents differs from that in the particulars. Notwithstanding such a condition the purchaser is entitled to have what he has bought distinguished : *Flower v. Hartopp*, 1843, 6 Beav. 476.

A condition that "the quantities of the land shall be taken as stated, whether more or less, although the title deeds state such quantities to be less," and that "no other evidence of identity shall be required than that furnished by the documents of title, and the statements contained therein shall be conclusive evidence of identity," was held to preclude the purchaser from objecting that the abstract showed title to 3 roods 22 perches only, the property being described in the particulars as 1 acre 2 roods 8 perches, and the purchaser was held not entitled to recover the deposit : *Nicoll v. Chambers*, 1852, 11 C. B. 996 (interpleader issue).

The effect of the condition, "the purchaser is not to require any further proof of the identity of the property than is furnished by the title deeds themselves," where the deeds did not show identity was considered in *Curling v. Austin*, 1862, 2 Dr. & Sm. 129. Kindersley, V.-C., said there, "I am of opinion that under this condition, if the deeds do not show identity, the purchaser cannot call for any other evidence ; but that, on the other hand, the contract is in effect that the deeds shall show identity ; so that, if they do not, a good title is not made." That was an action by the purchaser for specific performance, and the Judge referred the matter to chambers on two points, one of which was as to proof of identity.

A condition that "the estate as to extent of acreage, and other matters of description, shall be taken as conclusively shown and defined by certain specified deeds without further evidence," will not preclude the purchaser from rescinding and recovering his purchase money on the ground of the inaccuracy of a statement made to him by the vendor as to the quantity.

Such a condition is “no more than a conveyancing provision as to identity, that the estate sold, represented as consisting of 1,530 acres, should, as to its extent of acreage and other matters of description, be taken to be conclusively identified by the title deeds”: per Lord Cairns in *Aberaman Works v. Wickens*, 1868, 4 Ch. at p. 105.

A condition that a certain plot “cannot be properly identified by the vendor . . . but it is fairly presumed that the purchaser, by inquiry in the vicinity, will be able to ascertain the true situation, and he is to accept this plot by the description only contained in the conveyance deed of it,” is insufficient if the purchaser’s inquiries turn out to be unsuccessful: *Robinson v. Musgrove*, 1838, 2 Moo. & R. 92. Identification impossible.

On a sale of adjacent freeholds and copyholds, the condition that “the purchaser shall not be entitled to have it shown how much is freehold and how much copyhold,” binds the purchaser for all purposes of the sale, and a stipulation that the timber on the property is to be taken at a specified valuation is covered by the condition, so that the purchaser cannot object that he does not know how much of the timber is on copyhold land: *Crosse v. Lawrence*, 1852, 9 Ha. 462. In that case, the sale of the land and timber was one entire contract, and the vendor’s duty of making out his title to the timber was limited by the condition. If the sale of the timber had been a separate contract, he would have been obliged, in the absence of further stipulation, to show that it stood on the freehold portion of the property, as otherwise the purchaser would not be sure of having a right to fell and remove it. The stipulation that the timber shall be paid for at a valuation does not make the sale of the timber a separate contract: *Ibid.* Freeholds and copyholds mixed.

On a contract of sale of a house and land described as “freehold, except about eight acres, which are copyhold, but undistinguished, except as to not including any of the buildings,” after the abstract of title had been delivered, a supplemental agreement was entered into detailing what requisitions should be complied with, and amongst others the following requisition: “Declaration of identity of lands mentioned in deeds to those now sold.” It was held, that the meaning of this requisition was that the

purchaser was to be supplied with evidence that the lands sold were comprised either as freehold or as copyhold in the title produced, but that the vendor was relieved from the duty imposed on him by the original contract of proving that the buildings were not on the copyhold portion : *Dawson v. Brinckman*, 1850, 3 Mac. & G. 53.

On the sale of land described as containing 227 acres, 50 thereof copyhold and the rest freehold, a condition that the vendor shall not be required to distinguish the copyholds from the freeholds, and that no compensation shall be made if the copyholds exceed 50 acres, will not preclude the purchaser from objecting to the title, if he discovers *aliunde* that the copyholds are very much more than 50 acres : *Turquand v. Rhodes*, 1868, 37 L. J. Ch. 830.

Better evidence.

A condition that “ a statutory declaration of the possession or receipt of rents for thirty years and upwards according to the title declared, or of the identity of the premises, shall be deemed sufficient evidence of seisin or identity,” will not preclude the purchaser from requiring better evidence if the vendor has it ; and the purchaser may insist on a statutory declaration by the vendor that the declaration is the best evidence he can give : *Bird v. Fox*, 1853, 11 Ha. at p. 48.

IX. CONDITIONS AS TO CERTAIN SPECIAL MATTERS

	PAGE
(i) Recitals in documents twenty years old	254
(ii) An outstanding legal estate	256
(iii) Receipt for rent proving performance of covenants	257
(iv) Registration	261
(v) Stamping	261
(vi) Other matters	262

(i) *Recitals in documents twenty years old*

(i) Recitals
20 years old.

“ Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions ” : Vendor and Purchaser Act, 1874, s. 2 (2). As to recitals of documents, see Con-

veyancing Act, 1881, s. 3 (3), at the end of the sub-section, p. 241, above.

The recital of a fact is, by the Act, made sufficient evidence of the fact recited, but not of any fact, however probable, which may be inferred from it. A fact which must *necessarily* be inferred from the recited fact would no doubt be held to be covered by the statutory condition; but a fact which is merely the possible or probable result of the fact recited would not be within the condition. Inferences.

Thus, where the condition was that deeds ten years old should be "conclusive evidence of everything recited or stated therein," and the vendor offered as proof that the land was free from land tax, a deed in which the consideration was expressed to have been paid "in full for the absolute purchase of the premises, and the fee simple and inheritance thereof in possession, free from land tax and all other incumbrances," it was held that the purchaser was not precluded by the condition from requiring better proof. The only direct statement in the deed was that the property was *sold* free from land tax; it was not a necessary inference from this that the person so selling was entitled free from land tax: *Buchanan v. Poppleton*, 1858, 4 C. B. N.S. 20.

A recital twenty years old, that the trustees of a revocable settlement had, "in pursuance of the trust for sale conferred on them by the settlement, caused the premises to be put up for sale," was held sufficient evidence of the fact that the settlement had not been revoked: *Re Marsh and Granville*, 1883, 24 Ch. D. 11 (see p. 19). But in that case other evidence to this effect had been given by the vendor, so that it was not necessary to decide the point of the construction of the statute.

In *Gould v. White*, 1854, Kay, 683, Page-Wood, V.-C., doubted whether a recital in a surrender that J. had then lately been admitted there tenant in tail, according to the custom of that manor, was by the condition as to recitals made sufficient evidence that such admission was according to the custom, "because that is not a single fact, but rather a deduction from a series of facts." There seems, however, to be no foundation for this doubt. The existence of a custom is a fact as much as any

other fact. If the doubt had been whether the recital was sufficient, seeing that it did not directly state that there was a custom to entail, but merely allowed it to be inferred, the test laid down in *Buchanan v. Poppleton*, 1858, 4 C. B. N.S. 20 (see above), would show that the recital was sufficient, because the inference that there was such a custom was one necessarily to be drawn from the recital.

Recital of
seisin in fee.

In *Bolton v. London School Board*, 1878, 7 Ch. D. 766, Malins, V.-C., was of opinion that a recital in a deed twenty years old, that the then vendor was then seised in fee simple, precludes the purchaser from demanding the prior abstract, unless he can himself show that the recital is inaccurate. This view, however, was never accepted by conveyancers, and has been disapproved by Eady, J., in *Wallis and Grout*, (1896) 2 Ch. 206.

Not con-
clusive
evidence.

The statutory condition does not make recitals twenty years old *conclusive* evidence; the purchaser is not, therefore, precluded from showing the inaccuracy of the recitals. But even if the vendor used a condition making such recitals conclusive evidence, it is not quite clear that the purchaser would be precluded from proving *aliunde* their inaccuracy: see *Else v. Else*, 1872, 13 Eq. 196; and see above, p. 222, as to the effect of a condition making certain proof "conclusive."

(ii) *An outstanding legal estate*

(ii) Out-
standing
legal estate.

In the absence of any condition, the purchaser will be compelled to take an equitable title without the legal estate "where the legal estate is outstanding, without any claim of interest on the part of the person in whom it is vested": per Shadwell, V.-C., in *Craddock v. Piper*, 1844, 14 Sim. 310 (a sale by the Court). Some remarks of Lord Romilly, in *Freeland v. Pearson*, 1869, 7 Eq. 246, seem to limit this rule to the case where the legal estate is vested in an infant, or to cases where the court sees that the legal estate can be got in. And in *Scott v. Nixon*, 1843, 3 Dru. & War. at p. 408, Lord St. Leonards said that the purchaser is not bound to take an equitable title. In *Camberwell, &c. v. Holloway*, 1879, 13 Ch. D. at p. 763, Jessel, M. R., says: "The general rule is this, that a man makes a good title by showing a good equitable title and power to get in the legal

estate. You are not bound to trace the legal estate further than to show that you can get at it."

On the sale of leasehold property with a condition, "the purchaser shall be satisfied with an assignment from H.'s executors of the beneficial interest," the Court refused specific performance on the ground that, so long as the legal estate was outstanding, the vendors could not say they had the whole beneficial interest: *Smith v. Ellis*, 1850, 14 Jur. 682.

A condition that "as the vendor has only the equitable interest in the property, and the legal estate is not vested in the vendor, the purchaser shall accept such title as the vendor is able to deduce and convey," was held to preclude the purchaser from objecting that the legal estate might be set up adversely to him, and the purchaser failed to recover his deposit: *Ashworth v. Mounsey*, 1853, 9 Ex. 175. See further the cases stated above (at pp. 221, 220, and 225 respectively): *Whiteley v. Taylor*, 1876, 35 L. T. 187; *Duke v. Barnett*, 1846, 2 Coll. 337; and *Sellick v. Trevor*, 1843, 11 M. & W. 722.

A condition that the purchaser "shall not require the legal estate *if outstanding* to be got in," is not misleading, even if the legal estate is outstanding: *Williams and Parry*, 1895, 72 L. T. 869.

A condition may be so worded as to entitle the purchaser to a conveyance of the legal estate if he succeeds in tracing it, but not to entitle him to delay completion on the ground that it is doubtful in whom the legal estate was outstanding: *Sheerness Waterworks Co. v. Polson*, 1861, 3 De G. F. & J. 36.

The condition, "the purchaser shall bear the expense of tracing and getting in all outstanding legal estates (if any)," does not preclude the purchaser from requiring the vendor to get in the legal estate when it is traced, the purchaser bearing the cost. See *Freeland v. Pearson*, 1869, 7 Eq. 246.

(iii) *Receipt for rent made evidence that covenants have been performed*

Upon the sale of land held by lease, other than under-lease, "on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the

Receipt for rent.

purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase": Conveyancing Act, 1881, s. 3, part of sub-s. (4).

Upon the sale of land held by under-lease, "on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase; and further, that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date": Conveyancing Act, 1881, s. 3, part of sub-s. (5).

Sub-sect. (4) does not apply to land held by lease at a peppercorn rent, because such rent is not "paid," but "rendered": *Moody and Yates*, 1885, 30 Ch. D. 344. The usual condition in such a case is that *possession* under the lease shall be conclusive evidence.

The statutory conditions differ from those used in practice in two points: (1) the receipt is not made *conclusive* evidence of the performance of the covenants; (2) it is not made evidence that any breach of the covenants has been waived. They merely prevent the requisition, "Have the covenants been kept?" If the purchaser discovers a breach *aliunde*, they do not prevent his requisition, "Has the breach been waived?" *Higgett and Bird*, (1903) 1 Ch. 287.

"Conclusive"
evidence.

A condition making the last receipt for rent *conclusive* evidence that all covenants had been performed up to completion was held to preclude the purchaser from objecting that the covenant to repair had in fact not been performed: *Bull v. Hutchens*, 1863, 32 Beav. 615. See, however, p. 222 as to the force which ought to be given to the word "conclusive." But whatever effect should be given to this word, the addition of words making the receipt sufficient evidence of the waiver of any breach will preclude the purchaser from requiring evidence of waiver: *Howell v. Kightley*, 1856, 21 Beav. 331. But even if the condi-

tion makes the receipt conclusive evidence of the waiver of any breach, this would probably be insufficient to compel the purchaser to complete if it were proved that the landlord intended to enforce the forfeiture : *Ibid.*

If the vendor is aware of any particular existing breach which has not been waived, and does not mention it, the statutory conditions, and probably even the most stringent conditions, would not, if the purchaser discovered it, enable the vendor to obtain specific performance : see above p. 232. Still less would they protect the vendor who wilfully (or inadvertently, *qu.?*) broke the covenants after the contract for sale had been entered into. "Although the vendor has inserted in his condition that possession shall be deemed a waiver of all breaches 'up to the completion of the sale,' I think that it will not justify him in committing a forfeiture after the contract, entitling the landlord to enter, though the condition of sale may be sufficient to cure the defect up to the contract": Romilly, M. R., in *Howell v. Kightley*, 1856, 21 Beav. at p. 336; approved by the Court of Appeal in *Lawrie v. Lees*, 1880, 14 Ch. D. at p. 260. In *Howell v. Kightley* the breach was that of the covenant to insure; and the purchaser could not obtain the protection of 22 & 23 Vict. c. 35, s. 8. The sale was made on the 24th of September, 1854, and the premium on the policy became due on the 29th of September, and the days of grace expired on the 14th of October, and nothing was paid until the 24th of October. It does not appear from the report whether the breach occurred through mere neglect, or through wilful default. But in *Lawrie v. Lees*, 14 Ch. D. 249, at p. 255, James, L. J., said that in *Howell v. Kightley* it was a wilful breach. It has been said that if the purchaser knows of the breach when he enters into the contract this does not prevent him from complaining of the breach in cases where there is no condition making the receipt of rent conclusive : *Higgett and Bird*, (1903) 1 Ch. 287; see further above, p. 211. The case of *Higgett and Bird*, however, is to be taken as one in which there was an express agreement to make a good title : per Romer, L. J., in *Allen and Driscoll*, (1904) 2 Ch. at p. 231.

Known
breaches.

Person signing receipt.

If the receipt is signed by a person who is not the original lessor, the purchaser may, at all events if there has been a breach, require proof that such person is entitled to give the receipt. See *Turner v. Marriott*, not reported, but mentioned in Dart, p. 191. Even where there has been no breach, yet if there is a reasonable doubt as to the person entitled to the reversion, much more if there is a certainty of litigation, the purchaser will not be compelled to complete: *Pegler v. White*, 1864, 33 Beav. 403.

Under-lease.

On the sale of an under-lease, the production of the ground landlord's receipt for rent, which the vendor had paid him under a threat of distress for the ground rent, is not "production of the receipt for the last payment due for rent under the under-lease": *Higgins and Percival*, 1888, 59 L. T. 213.

Continuing breaches.

A condition making the receipt conclusive evidence of performance of covenants or waiver of breach up to the time of completion, applies to continuing breaches: *Lawrie v. Lees*, 1880, 14 Ch. D. pp. 257 and 261; 7 App. Ca. at p. 31. In *Bull v. Hutchens*, 1863, 32 Beav. 615, there was a breach of a covenant to repair, and a condition simply making the receipt conclusive evidence of performance (omitting the words as to waiver) was held to be sufficient to preclude the purchaser from objecting to the breach. In *Howell v. Kightley*, 1856, 21 Beav. 331, the breach was held not to be covered by the condition, but the *ratio decidendi* was not that the breach was a continuing one, but that it was first committed after the sale was entered into.

Other evidence.

In the absence of any condition as to the evidence of the performance of the covenants, an affidavit by the vendor, that to the best of his knowledge and belief the covenants have been performed, is sufficient evidence to entitle him to specific performance, unless the purchaser can adduce proof of the breach of the covenants: *Ringer to Thompson*, 1881, 51 L. J. Ch. 42 (before the Conv. Act, 1881). The refusal of the lessor to accept rent, and the commencement by him of an action of ejectment for the breach of the covenant to repair, which has been stayed in default of delivery of particulars of breach, is not sufficient proof to outweigh the vendor's affidavit: *Ibid*.

(iv) *Registration*

A general condition providing that no objection shall be taken "on account of any document not being registered in the Middlesex Registry," is not misleading, even if the vendor knows of the non-registration of any particular document. A purchaser was held bound by such a condition, though the will under which the vendors claimed had not been registered, and ten years had elapsed since the testator's death, and the name of his heir-at-law was not known, so that searches for conveyances by him could not be made: *Girling v. Girling*, 1886, W. N. 18. Registration

(v) *Stamping*

"Every condition of sale framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp upon any instrument executed after the 16th day of May, 1888, and every contract, arrangement, or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument, or indemnifying against such liability, absence, or insufficiency, shall be void": Stamp Act 1891, s. 117. Stamps.

With regard to deeds executed before the 17th of May, 1888, the purchaser is, in the absence of stipulation, entitled to have stamped at the vendor's expense all deeds forming part of the title during the statutory or stipulated period, except perhaps such deeds as are useless for the protection of the purchaser: *Smith v. Wyley*, 1852, 16 Jur. 1136.

The purchaser is entitled to have an agreement for a yearly tenancy stamped at the vendor's expense: *Coleman v. Coleman*, 1898, 79 L. T. 66.

A purchaser is entitled to require an insufficiently stamped mortgage deed to be stamped at the vendor's expense, although the mortgagee joins in the conveyance to the purchaser: *Whiting to Loomes*, 1881, 17 Ch. D. 10. There the purchaser might have required the deed to protect himself against an incumbrancer of the equity of redemption (per James, L. J., *ibid.*) and also to show who the mortgagee was and why he joined in the conveyance: per Pearson, J., in *Ex parte Birkbeck*, 1883, 24 Ch. D. at p. 124.

But where a building society had conveyed to several allottees, and the latter had, on having their purchase money refunded, reconveyed to the society by unstamped deeds, purchasers from the society who were to get a conveyance from the society and the allottees, were held not entitled to require the deeds of reconveyance to the society to be stamped : *Ex parte Birkbeck, ubi sup.* This was a case of compulsory sale, and the purchasers (the Conservators of Epping Forest) could have vested, and afterwards did vest, the property in themselves by a deed poll under the Lands Clauses Act, 1845, s. 75.

(vi) *Other matters*

Lessor's
licence.

If leaseholds are sold "subject to the landlord's approval" the purchaser has no right of action against the vendor who fails to obtain that approval after using his best endeavours ; the vendor is not bound to sue his landlord to compel him to give his licence : *Lehmann v. M^r Arthur*, 1868, 3 Ch. 496. *V. infra*, p. 398.

Statutory
Declarations.

A condition binding the purchaser to accept "a statutory declaration of the seisin of G. free from incumbrances" does not bind him to accept a declaration that the declarant had "heard and believed that G. became possessed of the premises as the sole and absolute owner thereof, in fee simple," making no mention of incumbrances : *Nott v. Riccard*, 1856, 22 Beav. at p. 313.

X. DELIVERY OF ABSTRACT : WAIVER OF REQUISITIONS

Delivery of Abstract

The vendor is bound to deliver an abstract of title, in the absence of any condition to the contrary ; delivery of the title deeds is not enough : Sug. 406. The purchaser, though bound to accept the title, may still require an abstract.

In the case of one tenant in common purchasing from another or a partner purchasing from another partner, it would seem that, in the absence of stipulation, no abstract of the general title can be required : *Law v. Law*, 1845, 9 Jur. at p. 749 ; *Brooke v. Garrod*, 1857, 2 D. & J. at p. 68.

A stipulation by the representatives of a deceased partner, selling to the surviving partner, that they would furnish an

abstract of title, binds them to furnish an abstract of the general title and not merely the letters of administration under which they act : *Morris v. Kearsley*, 1837, 2 Y. & C. Ex. 139.

An agreement to take a free conveyance does not imply an acceptance of the vendor's title, and will not preclude the purchaser from requiring an abstract and making requisitions : *Pelly and Jacob*, 1899, 80 L. T. 45.

On an agreement to sell leasehold property, the vendor to grant an under-lease to the purchaser, a condition that no abstract of the vendor's title shall be required does not preclude the purchaser from requiring inspection of the lease under which the vendor holds : *Allen v. Clark*, 1863, 11 W. R. 304.

In the condition "the vendor will deduce a good title according Time. to these conditions and deliver an abstract within two months to the purchaser," the stipulation as to time applies simply to the delivery of the abstract and not to the deduction of title : *Sherwin v. Shakspear*, 1854, 5 D. M. & G. at p. 528.

Though a time is fixed in the conditions for the delivery of the abstract, the vendor's default does not necessarily entitle the purchaser to rescind, time not being regarded as of the essence of the contract, unless made so by express stipulation, by the nature of the property, or the circumstances of the case : *Roberts v. Berry*, 1853, 3 D. M. & G. 291.

If the vendor fails to deliver the abstract within a reasonable time after the date fixed (or, if no date is fixed, within a reasonable time after the sale), the purchaser may rescind. In *Fenn v. Cattell*, 1872, 27 L. T. 469, the condition stipulated for delivery of the abstract within twenty-one days, and the abstract was not delivered until 118 days after the sale ; this was held to be an unreasonable delay, and one justifying the purchaser in rescinding.

Where, by a contract dated 25th August, and fixing Michaelmas as the date for possession, no time was fixed for the delivery of the abstract, and an insufficient abstract had been sent on the 27th August, and the insufficiency of this abstract had been pointed out on the 30th August, and on the purchaser's request for a further abstract the deeds in the vendor's possession were sent on the 4th September, and after further requests for an

abstract, the purchaser's solicitors, on the 13th September, sent a notice in writing to the vendor's solicitor, that, unless a proper abstract was sent within fourteen days, the purchaser would treat the contract as at an end, it was held that the period of fourteen days was a reasonable period: *Compton v. Bagley*, (1892) 1 Ch. 313.

If the purchaser fails to return an abstract delivered too late, he would probably be held to have waived his right to rescind on account of such lateness of delivery (*Seton v. Slade*, 1802, 7 Ves. at p. 278); unless he has received the abstract "without prejudice": *Tilley v. Thomas*, 1867, 3 Ch. 61. And it would seem that a purchaser who neglects to ask for the abstract within a reasonable time before the day fixed for its delivery cannot object to the lateness of delivery: *Guest v. Homfray*, 1801, 5 Ves. at p. 823.

Where the stipulation was that the abstract should be delivered immediately, and if the title should not be perfected by the day specified the purchaser should be released, and the purchaser received the abstract at a time when it was impossible for the title to be perfected by the day fixed for completion, the purchaser was held to have waived the benefit of the stipulation as to time: *Hipwell v. Knight*, 1835, 1 Y. & C. Ex. at p. 419.

In construing conditions requiring the purchaser to make his requisitions within a given time "after the delivery of the abstract," the words "delivery of abstract" are taken to mean the delivery of a perfect or sufficient abstract: *Upperton v. Nickolson*, 1871, 6 Ch. 436; *Hobson v. Bell*, 1839, 2 Beav. 17; *Blacklow v. Laws*, 1842, 2 Ha. 40. See below, p. 268, as to the time allowed for requisitions when the abstract is imperfect. By a perfect abstract is meant the most perfect abstract in the vendor's possession (actual or constructive) at the time of delivery: *Morley v. Cook*, 1842, 2 Ha. pp. 111, 112, 114; *Oakden v. Pike*, 1865, 34 L. J. (Ch. 620; *Parr v. Lovegrove*, 1857, 4 Drew. 170. An abstract is not necessarily imperfect because it does not show a title for the full period of sixty (now forty) years (*Blackburn v. Smith*, 1848, 2 Ex. 783, where the vendor expressly agreed to deliver a full and sufficient abstract), or because it shows a bad title (*ibid.* p. 789). An insufficient or imperfect

· Abstract " means "perfect abstract."

abstract means an abstract which does not truly or sufficiently abstract the deeds purporting to be abstracted, or which does not abstract the whole of the muniments of title (covering, at least, the period fixed by law, or by the contract, for length of title) in the vendor's custody, power, or knowledge, or does not state the facts (with dates) of deaths, births, &c., material to the title. It is not necessary, in order to perfect the abstract, that it should have been compared by the purchaser with the documents themselves, or that the vendor should expressly offer to show the deeds whenever desired : *Oakden v. Pike*, 1865, 34 L. J. Ch. 620.

There seems to be no authority on the point whether it is permissible for the vendor to compile an abstract of any particular document from a recital of that document instead of from the original document itself. If the vendor has so compiled the abstract he will naturally conceal this from the purchaser. But if the purchaser can show that this has been done he can, probably, insist on the abstract being compiled from the original document.

Documents forming links in the chain of title must be abstracted in chief ; an abstract by way of recital in a subsequent abstracted deed is insufficient : *Stamford Banking Co. and Knight*, (1900) 1 Ch. 287. A less strict rule was applied in *Ebsworth and Tidy*, 1889, 42 Ch. D. 23, by North, J., but the same Judge in *Stamford Banking Co. and Knight* explained that in *Ebsworth and Tidy*, at the stage of the proceedings which had then been reached, an abstract would have been a useless expense.

A lease determined by re-entry ought to be abstracted if the term has not expired : *Heaysman and Tweedy*, 1893, 69 L. T. 89. Also, the judgment in an action of ejectment against the lessee : *Ibid.*

Where land is being or has been sold by order of the Court, the abstract must set out the pleadings sufficiently to show that the Court had jurisdiction : *Waters v. Waters*, 1866, 36 L. J. Ch. 195.

Copies or tracings of plans on abstracted deeds are now by the practice of conveyancers a necessary part of the abstract. A different opinion was expressed in *Blackburn v. Smith*, 1848,

2 Ex. at p. 792, approved Sug. 408. But Wickens, V.-C., in *Brown v. Wales*, 1872, 15 Eq. at p. 147, said that a map is as much a part of the title as the operative part of the deed. See further, Dart, 340; Williams, 94; Gover, 9.

If a schedule to a deed does not relate to the property sold, the purchaser is not entitled to an abstract of it in order to satisfy himself that the schedule does not affect the property: *Glenton to Haden*, 1885, 53 L. T. 434.

In abstracting a deed or will, the limitations and uses should be accurately stated; if there are any trusts, they should be stated; all modifications, by proviso or otherwise, should be accurately stated: Sug. 408, 410. In the case of a "home-made" will the whole will should be copied *verbatim*.

A deed or will is sufficiently abstracted (for the purpose of entitling the vendor to say that an objection is waived) even though all the clauses thereof are not set out, provided that the clauses on which the objection is founded are set out.

In *Oakden v. Pike*, 1865, 34 L. J. Ch. 620, the vendor deduced his title from a devise in a will to "the sons of R. O. (if he should leave any), to the eldest son, and, if he should die without male issue, then to his second son, and to all his sons severally and successively, according to their respective seniority in tail male," and a disentailing deed executed by R. O. and his eldest son. The purchaser sent in an objection (beyond the specified time) that the estate in tail male of the eldest son was contingent on the event of his surviving his father. The will contained a residuary devise (which was not abstracted) to R. O. in fee. Kindersley, V.-C., held that the will was sufficiently abstracted for the purpose of raising the objection taken by the purchaser since the vendor's title did not depend upon the residuary devise, and that the objection, being too late, was to be held waived.

A statement in the abstract of a will, that trustees are to sell and hold the produce "upon the trusts for the children of F. S., as therein mentioned," is sufficient to call on the purchaser to make a requisition as to what those trusts are: *Want v. Stallibrass*, 1873, L. R. 8 Ex. 175.

An abstract of a marriage settlement, omitting the covenant to settle after-acquired property, which alone affected the

subject of the sale, was held to be insufficient : *Burnaby v. Eq. Reversionary Int. Soc.*, 1885, 54 L. J. Ch. 466.

A document is not sufficiently abstracted if the abstract in chief contains a material clerical error, even though in a subsequent document there is a recital fully abstracted, correctly setting forth the previous document : *McCulloch v. Gregory*, 1855, 1 K. & J. at p. 292.

The onus of proving that the abstract delivered by the vendor is not perfect lies on the purchaser : *Ward v. Ghrimes*, 1863, 9 Jur. N. S. 1097. Burden of proof.

The purchaser may recover damages (if he has suffered any) in consequence of the vendor's breach of contract to deliver a perfect abstract, but it is improbable that a purchaser should suffer damages through such a breach : *Gray v. Fowler*, 1873, L. R. 8 Ex. at p. 282. In *Steer v. Crowley*, 1863, 14 C. B. n.s. 337 (where, however, it was said the vendor was not bound to give a perfect abstract), one shilling damages was given, because the abstract first sent was misleading. The purchaser may get damages (if any) resulting from the vendor's false representation that the abstract is perfect : *Gray v. Fowler*, *ubi sup.* Damages.

In *Gray v. Fowler*, 1873, L. R. 8 Ex. at p. 265, there are some remarks of Lord Bramwell which seem to lay down that if the abstract is imperfect, and the purchaser makes a requisition on a defect not disclosed by the abstract, the vendor loses the right of rescission given him by the condition for rescission. This, it is submitted, cannot be supported ; the delivery of a perfect abstract, though a condition precedent to the acquisition by the vendor of a right to disregard requisitions not sent in within the time fixed, is not a condition precedent to the exercise by the vendor of his right to rescind. Condition enabling vendor to rescind.

Conditions with respect to Requisitions

As to the effect of a condition as to "free conveyance," see above, p. 263.

In conditions requiring a purchaser to send in his requisitions within a given period, time is of the essence of the contract, whether it is so stated or not : *Oakden v. Pike*, 1865, 34 L. J. Ch. 620. If a time is fixed for the delivery of the abstract, and the Time for requisitions

abstract is not delivered within such time, the condition requiring the purchaser to send in his requisitions within a given time will not be binding, and the purchaser will be allowed a reasonable time for sending in requisitions : *Upperton v. Nickolson*, 1871, 6 Ch. 436. It makes no difference if the condition as to sending in requisitions contains a stipulation that time shall be of the essence of the contract, and no such stipulation is contained in the condition as to the delivery of the abstract : *Ibid.*

The words " within ten days after the delivery of the abstract " mean ten days not reckoning the day on which the abstract is delivered : *Tanner v. Smith*, 1840, 4 Jur. at p. 312. See per Parke, B., in *Blackburn v. Smith*, 1848, 2 Ex. at p. 789.

Where there is a condition requiring the purchaser to send in his requisitions within a given time after the delivery of the abstract, and the abstract, though delivered in time, is imperfect (see above, p. 264), the purchaser has a further time for sending in his requisitions on points arising on the supplemental abstract : *Gray v. Fowler*, 1873, L. R. 8 Ex. 280. Such requisitions must be sent in within a corresponding period after the delivery of the supplemental abstract ; that is to say, if the condition fixed fourteen days after the delivery of the abstract, these requisitions must be sent in fourteen days after the delivery of the supplemental abstract : *Hobson v. Bell*, 1839, 2 Beav. 17. Requisitions on points disclosed by the first imperfect abstract must probably be sent in within the time fixed, the extension of time only applying to points arising on the new abstract or answers to requisitions : *Ward v. Ghrimes*, 1863, 9 Jur. N. S. 1097 ; and see *Morley v. Cook*, 1842, 2 Ha. at p. 112.

If the purchaser discovers a defect in the title sufficiently serious to make the title bad or doubtful, which should have been, but was not, either disclosed by the abstract or mentioned in the conditions, the stipulation as to sending requisitions within a given time will not preclude him from objecting to the title on the ground of the undisclosed defect : *Warde v. Dixon*, 1859, 28 L. J. Ch. 315.

If the vendor by means of a condition limiting the title to less than forty years seeks to avoid the duty of mentioning in his abstract a restrictive covenant contained in an earlier deed and

affecting the land in the hands of the purchaser, the latter may object to the title within a reasonable time after he discovers the restrictive covenant, even though the time fixed by the conditions for sending in requisitions has expired: *Cox and Neve*, (1891) 2 Ch. 109. The condition refers to objections and requisitions addressed to the abstract as then delivered: *Ibid.* p. 118.

The words "objections to title" do not include the purchaser's objection that the vendor has misdescribed the property or made a misrepresentation. Objections to title, what.

Where a reservoir and waterworks were described as yielding a rent of 60*l.* an objection that this rent was derived from supplying with water certain houses separated from the reservoir by the property of strangers, over which the vendor had no easement, or any right, beyond a licence from year to year by payment of a rent, was held not to be an "objection to the title": *Price v. Macaulay*, 1852, 2 D. M. & G. 339.

The objection that the legal estate is outstanding was held by Joyce, J., in *Pryce-Jones v. Williams*, (1902) 2 Ch. 517, to be covered by the condition. But a similar objection was held by Eady, J., in *Scott and Eave*, 1902, 86 L. T. 617, as not covered by the condition, being in substance a requisition that a third party shall join in the conveyance. It is submitted that the latter is the more correct view, and that at any rate in cases where a legal estate or outstanding term is vested in trust for the vendor this is matter of conveyance, not of title, and need not be raised until the purchaser sends in his draft conveyance.

It is also suggested that a claim for compensation for a defect (other than a defect in title) or for a misstatement in the particulars may be made after the time fixed for sending in requisitions, unless the condition as to requisitions expressly mentions claims for compensation or requisitions in respect of the particulars: see p. 292, below.

Compare, for the meaning of the words "objections and requisitions," the cases on the condition for rescission, pp. 355 *et seq.*, below.

The condition requiring the purchaser to send in his objections within a given time does not preclude the purchaser from taking an objection which arises out of evidence called for before the Further requisitions.

expiration of the time fixed : *Blacklow v. Laws*, 1842, 2 Ha. 40. The purchaser will, it seems, be allowed a corresponding period after the production of the evidence. See *Hobson v. Bell*, 1839, 2 Beav. 17, and *Morley v. Cook*, 1842, 2 Ha. at p. 112.

No title
at all.

Where the vendor has no title at all, the condition that objections, if not taken by a given time, are to be considered as waived will not enable the vendor to obtain specific performance. And in one case the purchaser even recovered his deposit on this ground : *Want v. Stallibrass*, 1873, L. R. 8 Ex. 175 ; see below, p. 271.

The question of the effect of the vendor having “no title at all” arises in connection not only with the condition as to delivering requisitions within a given time, but also in connection with other conditions—*e.g.* the condition for rescission. For convenience, the cases where it might be doubted whether the vendor had some title or “no title at all” are enumerated here, and are referred to again under their appropriate headings.

Where devisees in trust for sale after the death of S. sold during S.’s lifetime, this was a case of no title at all : *Want v. Stallibrass*, 1873, L. R. 8 Ex. 175 (condition as to delivering requisitions within a given time).

Where on the sale of the fee the vendor had only the residue of a term which expired soon after the contract, the vendor was treated as having no title at all : *Bowman v. Hyland*, 1878, 8 Ch. D. 588. *Secus*, where the vendor had an under-lease at a peppercorn for thirty years, and possibly the fee : *Isaacs v. Towell*, (1898) 2 Ch. 285.

Where the vendor sold four plots of land and had no title to one and part of another plot, this was not a case of “no title at all” : *Ramuz and Edwards*, 1893, 37 Sol. J. 701. Similarly where as to one-third of the property the vendor only had an estate *pur autre vie* : *Williams v. Edwards*, 1827, 2 Sim. 78. Similarly where as to 1½ acre out of 5 acres the land was delph land enclosed 27 years ago and held along with the remaining 3½ acres : *Heppenstall v. Hose*, 1884, 51 L. T. 589.

The fact that the legal estate is outstanding (*Pryce-Jones v. Williams*, (1902) 2 Ch. 517) or that the vendor has only a bare possessory estate (*Rosenberg v. Cook*, 1881, 8 Q. B. D. 162) does

not make out a case of "no title at all." Similarly where a vendor mortgagee of leaseholds who had contracted to sell the entire term only held by sub-demise and the legal estate in that sub-demise was outstanding in another mortgagee, said to have been paid off : *Deighton and Harris*, (1898) 1 Ch. 458.

Want of title to the minerals, in the case of a residential property, is not having no title at all : *Jackson and Haden*, (1906) 1 Ch. pp. 419 and 424. But want of title to minerals was treated in *Bellamy v. Debenham*, (1891) 1 Ch. 412, as justifying the purchaser in rescinding at once.

On an agreement to grant a lease, the fact that the property was held under a lease with other property at one entire rent and under some special covenants was held to preclude the lessor from obtaining specific performance although the lessee had waived his right to object to the title : *Warren v. Richardson*, 1830, You. 1.

It is not quite clear whether the fact that the vendor has no title at all will enable the purchaser to recover his deposit when he has not complied with the condition as to sending in requisitions before a given date. In *Scott and Alvarez*, (1895) 2 Ch. 603, it was held that if a defect in title is covered by the condition the purchaser cannot recover his deposit even if in consequence of that defect the vendor has no title at all. It would seem to be a natural corollary to that case to hold that if the purchaser is too late in sending in his requisitions, he will be unable to recover his deposit even if the vendor has no title at all. But in *Want v. Stallibrass*, 1873, L. R. 8 Ex. 175, it was decided that where the vendor has no title at all the purchaser's failure to comply with the condition binding him to send in his requisitions by a given date will not enable the vendor to forfeit the deposit. *Want v. Stallibrass* was not cited in *Scott and Alvarez*; and though the two cases do not seem to be reconcilable, it would be rash to conclude that *Want v. Stallibrass* is virtually overruled, especially as it was cited by Cotton, L. J., in *Soper v. Arnold*, 1887, 37 Ch. D. 101, without disapproval, and was approved by Romer, J., in *Saxby v. Thomas*, 1890, 63 L. T. 695. On the other hand, Stirling, J., in *Life Interest v. Hand-in-Hand*, (1898) 2 Ch. at pp. 238, 239, approved of the view that a purchaser, though

bound by the condition to the extent of losing his deposit, may yet as defendant to an action for specific performance successfully object that the vendor is unable to sell.

Doubtful
title.

If the purchaser's requisition is sent in too late, and the Court thinks the point raised by the requisition makes the title not wholly bad but merely doubtful—i.e. so doubtful, that but for the condition it ought not to be forced upon the purchaser—the condition will, it is submitted, even in an action by the vendor for specific performance, preclude the purchaser from raising the point : *Oakden v. Pike*, 1865, 34 L. J. Ch. 620. Kay, J., decided otherwise in *Tanqueray-Willaume and Landan*, 1882, 20 Ch. D. 465 ; see pp. 473, 474. But the proposition just stated seems a natural corollary from the decision of the Court of Appeal in *Scott and Alvarez*, (1895) 1 Ch. 596.

Bona fides.

Where the conditions of sale mask a defect in the title in such a way as to show want of *bona fides* in the vendor, the condition making time essential for the sending in of requisitions will not be enforced against the purchaser, especially if the title is radically bad and the time given short compared with the length of the abstract : *Boyd v. Dickson*, 1876, 10 Ir. R. Eq. at p. 255.

In another case, where the vendor was not acting *bonâ fide*, the purchaser recovered his deposit on the ground that a plot of land, part of the property, could not be found, although his requisition on the point was too late, according to the conditions : *Robinson v. Musgrove*, 1838, 2 Moo. & R. 92.

After pay-
ment of pur-
chase-money.

On a sale by the Court, where a defect in title was not sufficiently disclosed by the abstract, a purchaser was allowed to rescind, even after he had paid the purchase money into Court, and even though, but for the negligence of his solicitor, the defect might have been discovered in time : *McCulloch v. Gregory*, 1855, 1 K. & J. 294.

In any case of fraud or of "common mistake" where the purchaser is relieved after completion, the purchaser would be relieved from the condition as to requisitions. See *Jones v. Clifford*, 1876, 3 Ch. D. 779.

Waiver by
vendor.

The vendor waives his right to treat requisitions as waived, if he receives and entertains requisitions after the time fixed,

without expressly reserving his right under the condition : *Oakden v Pike*, 1865, 34 L. J. Ch. 620. And the vendor's solicitor cannot by sending a further abstract "without prejudice" prevent the previous correspondence from amounting to a waiver : *Cutts v. Thodey*, 1842, 13 Sim. 206.

Waiver of Requisitions where no time fixed by the Conditions

In the absence of stipulations as to the time within which requisitions are to be sent in, the purchaser may waive his right to object to the title by a release in writing or parol, by taking steps towards completion without insisting on the defect, by taking possession, by exercising rights of ownership, or by completing the purchase.

The right to object to the title may be released by writing or parol ; a mere notification that the title is satisfactory is enough. And even without expressly releasing the vendor, the purchaser may, by his correspondence or conversation, give the vendor to understand that he has no intention of disputing the title, and in that case will be held to have lost his right to object to the title. Thus, where a purchaser who had taken possession kept the abstract more than a year without making any objections, and wrote to the vendor apologising for not paying the purchase money, he was held to have waived his right to object to the title : *Ansach v. Noel*, 1816, 1 Mad. 310. Release.

Acceptance of title to freeholds and copyholds, subject to the vendor furnishing a "declaration of identity of lands mentioned in deeds to those now sold," amounts to a waiver of the right to have the freeholds and copyholds distinguished from each other : *Dawson v. Brinckman*, 1850, 3 Mac. & G. 53.

Tendering a draft conveyance may be evidence of waiver. Thus, a purchaser of leasehold property who made other requisitions, but did not inquire as to the lessor's title, and who sent the draft conveyance to the vendor, was held to have waived his right to proof of the lessor's title : *Clive v. Beaumont*, 1848, 1 De G. & Sm. 397. A purchaser who forwarded the draft conveyance, without prejudice to the requisitions, was held to have waived his right to object to the title, as the only requisition not Taking steps to complete.

answered to the purchaser's satisfaction was one relating to the payment of the purchase money: *Sweet v. Meredith*, 1862, 8 Jur. N. S. 637.

Where the purchaser, who was in possession, retained the abstract for five months without objection, and, on being required by the vendor to complete within fourteen days, merely asked for production of title deeds, this was held to amount to waiver: *Pegg v. Wisden*, 1852, 16 Beav. 239.

Where the purchaser, knowing at the time of the defect in title, and not insisting on its removal, gave notice to the vendor to complete, this was held to be waiver: *Macbryde v. Weekes*, 1856, 22 Beav. 533.

The purchaser does not, by merely continuing to treat after knowledge of a defect, waive his right to object to the title on account of such defect. Thus, where the purchaser objected to a defect in the title, and continued to treat for five months, insisting that his requisitions had not been answered, but not specifying the objection in question, which was not one of the formal written requisitions, he was held not to have waived his right: *Hughes v. Jones*, 1861, 3 D. F. & J. 307.

Taking
possession.

Taking possession with the knowledge and consent of the vendor is not in itself sufficient evidence of waiver. If the conditions provide that possession shall be taken at an earlier date than that fixed for completion, the possession is explained as a carrying out of a part of the agreement, and not, therefore, an acceptance of the title: *Anspach v. Noel*, 1816, 1 Mad. 310.

Even though the conditions do not provide for possession, taking possession, though with the vendor's consent, amounts to a presumption of an acceptance of the title, and the onus of proof lies then on the purchaser (*Bown v. Stenson*, 1857, 24 Beav. 631), who may rebut the presumption by showing that the possession was not intended to have that effect. The fact that the purchaser raises and insists on objections to the title will rebut the presumption: *Hyde v. Warden*, 1877, 3 Ex. D. 72 (a case of an agreement to grant an under-lease). Taking possession without asking for an abstract may amount to waiver of the right to investigate the title. *Deller v. Simmonds*, 1859, 5 Jur. N. S. 997.

If a purchaser knows that there are defects in the title which the vendor cannot remove, and making no objection thereto takes possession of the property without being authorised by the conditions to enter into possession before completion, he waives his right to object to such irremovable defects : *Gloag and Miller*, 1883, 23 Ch. D. 320. If the defect is removable, the purchaser does not necessarily waive his right to have it removed : *Ibid.* A restrictive covenant affecting the property, and enforceable by third persons, is an irremovable defect : *Ibid.* So, too, is a right of sporting over the property vested in some third person over whom the vendor has no control : *Burnell v. Brown*, 1867, 1 J. & W. 172. A mortgage is a removable defect.

Where the contract provided that the abstract, if required, should be paid for by the purchaser, retention of possession for two years without asking for an abstract was held to be sufficient evidence of waiver of the right to examine the title : *Sibbald v. Lowrie*, 1853, 18 Jur. 141.

Taking possession and declining to discuss the title are sufficient evidence of waiver : *Hall v. Laver*, 1838, 3 Y. & C. 191.

Taking possession forcibly, or without the vendor's knowledge, amounts to waiver if the conditions do not provide for possession : *Calcraft v. Roebuck*, 1790, 1 Ves. jun. 221.

If the purchaser is under the conditions entitled to possession before completion, unimportant alterations made by him in the property—e.g. filling up a pond, levelling, removing an osier plantation—do not prove waiver of the right to object to the title : *Osborne v. Harvey*, 1841, 1 Y. & C. C. C. 116. But even with such a condition, making alterations in and letting the property go far towards proving waiver : *Anspach v. Noel*, 1816, 1 Mad. 310.

Exercising
rights of
ownership.

In the absence of a condition entitling the purchaser to possession before completion, unimportant acts of ownership (such as making a cesspool) are evidence of an acceptance of title : *Hyde v. Warden*, 1877, 3 Ex. D. 72.

Offering for sale, though not in itself sufficient to prove waiver, is a fact which tends to strengthen other evidence of waiver : *Simpson v. Sadd*, 1854, 4 D. M. & G. 665.

The purchaser of the benefit of an agreement for a lease of a public house who took possession without objecting to the title,

paid part of the purchase money and mortgaged his interest, was held to have waived his right to object to the title: *Haydon v. Bell*, 1838, 1 Beav. 337.

The granting of a lease by the purchaser is not conclusive evidence of waiver (*Ex parte Sidebotham*, 1834, 1 Mont. & A. at p. 661); but a purchaser who grants a lease, intending to give the lessee possession, will probably be held to have waived objections of which he was aware: *Ibid.*

A purchaser who fells ornamental timber, or does any other act for which compensation cannot be assessed, would probably be held to have waived the right to object to the title: Cf. *Magennis v. Fallon*, 1829, 2 Mol. 561.

If the purchaser goes on all the time insisting on objections to the title, this rebuts the evidence of waiver derived from the purchaser's possession and acts of ownership (*Hyde v. Warden*, 1877, 3 Ex. D. 72), unless the latter are such as to make it impossible to put the vendor back in the same position, if the sale is rescinded.

Partial
waiver.

A purchaser may waive an objection conditionally, or may waive an objection and reserve his right to insist on other objections, or may accept the title so as to preclude himself from rescinding without precluding himself from demanding compensation.

Waiver of the right to deliver requisitions does not preclude the purchaser from insisting on the verification of the abstract: *Southby v. Hutt*, 1837, 2 My. & Cr. 207.

Waiver of the right to an abstract does not preclude the purchaser from making requisitions in respect of defects which he discovers without an abstract: *Sidebottom v. Barrington*, 1842, 3 Jur. 947.

Insistence on one objection, and silence as to another, does not necessarily amount to waiver of the second objection: *Magennis v. Fallon*, 1829, 2 Mol. at p. 576. But on a purchase of freeholds and copyholds, acceptance of the title subject to the production of a "declaration of identity of lands mentioned in the deeds to those now sold" is a waiver of the right to have the freehold distinguished from the copyhold: *Dawson v. Brinckman*, 1850, 3 Mac. & G. 53.

When a purchaser discovers that a representation made to him by the vendor is untrue and the vendor suggests that, if time is given him, the misrepresentation may be cured, the purchaser does not, by giving the vendor time, lose his right to rescind on the ground of the misrepresentation if the vendor at the end of that time fails to make good his suggestion : *Tibbatts v. Boulton*, 1895, 73 L. T. 534.

Acceptance of title or waiver of requisitions does not necessarily import a waiver of a right to compensation : *Calcraft v. Roebuck*, 1790, 1 Ves. jun. 221 ; *Hughes v. Jones*, 1861, 3 D. F. & J. 307.

Where on a sale by the Court a misdescription was discovered before completion, and compensation claimed under the condition, and the purchaser accepted a conveyance with a correct description, he was held not to have waived his right to compensation, and the purchase money being still in Court compensation was allowed thereout : *Re Perriam*, 1883, 49 L. T. 710.

An acceptance of title does not debar the purchaser from objecting to a defect of which he was ignorant, and which should have been disclosed by the abstract, but was not : *Bousfield v. Hodges*, 1863, 33 Beav. 90. Unknown defect.

A waiver of the purchaser's right to make the vendor produce his title does not entitle the vendor to specific performance if he has no title at all : *Warren v. Richardson*, 1830, You. at p. 8.

Where the plaintiff had agreed to grant a lease of a house to the defendant, and the latter had waived his right to have a good title shown, but it was afterwards discovered that the plaintiff was only a lessee and that the house was included with others in one lease at an entire rent, the whole being subject to special covenants and a power for re-entry, the defendant was not compelled to complete : *Ibid.*

XI. PROCEDURE

The difference between the vendor suing for specific performance and the purchaser suing for his deposit has been adverted to above. Putting it briefly, if the condition does not cover the defect, then the purchaser will be able to recover his deposit and

expenses as well as to resist specific performance. If the condition covers the defect, but is not sufficiently explicit or is misleading, or the vendor has no title at all, the purchaser may resist specific performance, but is bound by the condition so as to be unable to recover his deposit.

It remains to discuss what the position is on a Vendor and Purchaser summons. If the *purchaser* takes out a summons asking for a declaration that the vendor has not shown a good title according to the contract and claiming repayment of the deposit, and the Court is of opinion that the defect in question is covered by the condition, then, though the defect may be such that the Court would not decree specific performance against the purchaser, the Court will dismiss the summons: *National Provincial Bank and Marsh*, (1895) 1 Ch. 190. Conversely, it would seem that if the *vendor* takes out the summons, and the Court is of opinion that specific performance ought not to be decreed, then, though the defect is covered by the condition so that the purchaser cannot recover his deposit, the Court will dismiss the summons.

Even if the purchaser in his summons merely asks for a declaration, and expressly waives all claim to the deposit and expenses, his summons ought, it is submitted, to be dismissed, if the conditions cover the objection. The Court cannot on a vendor and purchaser summons decide whether it was a case for specific performance, but merely whether a good title had been shown *according to the contract*.

The question whether the purchaser has waived his right to object to the title may, it is suggested, be decided on summons. The question of jurisdiction was not raised in *Gloag and Miller*, 1883, 23 Ch. D. 320.

CHAPTER XXII

COMPENSATION

	PAGE
(i) In the absence of Stipulation	279
(ii) What Errors are covered by the Condition	280
(iii) Conditions allowing Compensation to the Purchaser	285
(iv) Conditions refusing Compensation to the Purchaser	294
(v) Conditions allowing Compensation to the Vendor	298
(vi) Assessment of Compensation	299

(i) *In the absence of Stipulation*

IF there is no agreement to the contrary the purchaser may rescind and recover his deposit and expenses, if the misdescription or defect in title is essential, or if compensation cannot be fairly assessed; the vendor may, in the absence of fraud, enforce the contract with compensation if the misdescription or defect is non-essential; and the purchaser may enforce the contract with compensation even though the misdescription or defect is essential, provided compensation can be fairly assessed; see the rules laid down at pp. 78 and 99. The cases as to fraud and essential misdescription are set out at length at p. 60, and p. 78 respectively.

Compensation to purchaser.

In the absence of stipulation, the purchaser cannot after completion obtain compensation for any misdescription or defect, except in case of fraud or common mistake: see p. 152. His rights will depend on the covenants for title in the conveyance.

The law as to the vendor's right to compensation, in the absence of stipulation, does not appear to be settled.

Compensation to vendor.

From *Okill v. Whittaker*, 1847, 2 Ph. 338, it would seem that in the absence of stipulation the vendor is never entitled to compensation. But the cases stated p. 55, above, support the view that in the case of hardship, as, for instance, where the land sold largely exceeds the acreage stated in the particulars, and the

purchase money has been calculated by both the vendor and the purchaser on the footing of acreage, the vendor will be entitled to rescind, or, at all events, the purchaser will be unable to insist on completion without an increase of the purchase money.

Sometimes, instead of a condition allowing or refusing compensation, a condition is employed which merely stipulates that errors "shall not annul the sale." In such a case, if the vendor has grossly (even without fraud) misdescribed the property he cannot shelter himself behind the condition and sue the purchaser for the purchase money; as, where a profit rental of under 8*l.* was stated to be 47*l.* odd: *Wood v. Keep*, 1858, 1 F. & F. 331.

(ii) *What Errors are covered by the Condition*

(a) *Serious defects*

The construction of conditions relating to compensation, in regard to the question whether the condition covers serious defects or only slight errors, has varied considerably. The question of construction has been confused with the question whether the condition can be enforced. The latter question may be differently answered according as the condition is one allowing or one refusing compensation, and according as the action is brought by the vendor or by the purchaser. But it is wrong to say, as was said in *Cordingley v. Cheeseborough*, 1862, 4 D. F. & J. at p. 384, that the *construction* of the condition ought to vary.

In *Dimmock v. Hallett*, 1866, 2 Ch. at p. 29, Turner, L. J., said: "Such a condition applies to accidental slips, but not to a misrepresentation calculated materially to mislead a purchaser." And in *Whittemore v. Whittemore*, 1869, 8 Eq. at p. 606, Malins, V.-C., said: "Conditions of this kind must be construed as intended to cover small unintentional errors and inaccuracies, but not to cover reckless and careless statements." So, in *Portman v. Mill*, 1826, 2 Russ. 570, it was said that the condition would not "cover so large a deficiency."

But this sort of construction was ridiculed in *Terry and White*, 1886, 32 Ch. D. 14: see judgments of Lord Esher and

Lindley, L. J. Lord Esher, however, in *Fawcett and Holmes*, 1889, 42 Ch. D. at p. 158, expressed surprise at the judgment attributed to him in *Terry and White*.

An even more questionable construction of the condition is that which says that a condition "no error shall annul the sale but compensation shall be given or taken" applies only to errors which would annul the contract—*i.e.* does not apply to trivial errors. But this construction was adopted by Turner, V.-C., in *Leslie v. Thompson*, 1851, 9 Ha. at p. 273; compare *Painter v. Newby*, 1853, 11 Ha. at p. 30.

On the whole it may be gathered from the cases that, so far as the construction is concerned, the usual condition allowing (or refusing) compensation covers both trivial and serious errors. The *effect* of the condition, as distinguished from its construction, is considered below at p. 285.

(b) *Defects in title*

Considerable diversity of opinion is to be found on the point whether the words "error in description," or similar words, ought to be construed as covering defects in title. It might be suggested that any actual positive misstatement, even if its inaccuracy were due to a defect in the vendor's title, is covered by the condition, but that a mere defect in title in regard to a matter on which no misstatement had been made is not covered by the condition unless the condition expressly refers to the title. However, no such rule can be deduced from the reported decisions, nor can any rule be laid down which will reconcile all the cases. In *Beyfus and Masters*, 1888, 39 Ch. D. 110, where an under-lease had been described as a "lease," and there was a condition refusing compensation, it was said by Bowen, L. J., "An intending purchaser could satisfy himself by inspection whether the physical property had been described with sufficient accuracy, and we ought not to extend a condition of this kind to misdescription, which he could not discover till he received the abstract of title."

The description of freehold property as "copyhold" was held not to be covered by a condition for compensation for "mistakes or errors in the description of the premises or

any other errors in the particulars": *Ayles v. Cox*, 1852, 16 Beav. 23.

Where property was sold as freehold stabling with dwelling rooms over, and it turned out that the vendors, though in possession, were not entitled to the dwelling rooms over and a cellar underneath a portion of the property, a condition allowing compensation for "any error or misstatement in the particulars or these conditions" was held not to entitle the purchaser to compensation after completion: *Debenham v. Sawbridge*, (1901) 2 Ch. 98.

Where the vendor had only a life estate in part of the property, but sold as absolute owner, the Court of Appeal held that a condition for compensation in case any "error, misstatement, or omission" should occur, did not apply, as this was a mere defect in title: *Ex parte Riches*, 1883, 27 Sol. J. 313.

The description of property as "held for the residue of a term of ninety-nine years," where the vendor had only a derivative term of three days short of the original term, was held not to be covered by the words "error or misstatement of the property term of years ground rent or other description": *Madeley v. Booth*, 1848, 2 De G. & Sm. 718 (criticised by Jessel, M. R., in *Camberwell, &c. v. Holloway*, 1879, 13 Ch. D. at p. 760). The true view would seem to be that the condition covered the error, but that the vendor was not entitled to specific performance allowing compensation, the defect being an essential one. In *Beyfus and Masters*, 1888, 39 Ch. D. 110 (see above), errors in "the description of the property" were held not to cover such a defect.

The description "renewable every twenty-one years on payment of the customary fine at an annual rent of" &c., the fact being that there was no customary right of renewal, was held to be covered by the words "error or misstatement": *Painter v. Newby*, 1853, 11 Ha. 26 (the purchaser enforced specific performance with compensation).

The statement in the particulars that valuable deposits of strontia were believed to underlie the property was held not to be an "incorrect statement error or omission in the particulars" within the condition for compensation, although the vendor

was unable to show a good title to the minerals : *Neale and Drew*, 1897, 41 Sol. J. 274.

The absence of title to the minerals was held to come within a condition allowing compensation for "any error misstatement or omission in the particulars" : *Jackson and Haden*, (1905) 1 Ch. 603. (This point was not discussed in the Court of Appeal: see (1906) 1 Ch. 412.)

A condition for compensation for "a *mistake* in the description of the premises or *error* in the particulars" does not cover the case of the vendor describing the property as "inclosed by a wall with tradesman's side entrance," the fact being, as the vendor *knew*, that the wall did not form part of the property, and the side entrance was only used on sufferance : *Brewer v. Brown*, 1884, 28 Ch. D. 300 (where it appears the purchaser recovered his deposit).

(c) *Other matters.*

A condition for compensation for any "error or misstatement" does not cover the error of the vendor in selling house No. 4 as "No. 2"; the condition does not apply "if the description is of any other property than that intended to be sold" : *Leach v. Mullett*, 1827, 3 C. & P. 115.

A condition for compensation for "errors or misstatements," does not entitle the purchaser to compensation for a false estimate innocently made by the vendor of the annual value of the property, where such annual value is expressly stated to be "estimated" : *Hurlbutt and Chaytor*, 1888, 57 L. J. Ch. 421. There is in such a case no misstatement, unless the vendor made a dishonest estimate—*i.e.* did not really "estimate" the property at the value mentioned in the particulars. It might, however, be said that there is an "error"—*viz.* an error in the estimate itself.

The condition, "no purchaser shall be entitled to object by reason of any slight error or misdescription in the rental, as to the quantity of land, rent-tithe, rent-charge, or otherwise," was held to be sufficient to preclude a purchaser from demanding specific performance with abatement of the purchase money in respect of a misstatement of the valuation of the property, whereby the purchaser was deceived as to the proportion of taxes

payable by him. The valuation being 80*l.* was described as 67*l.*, and the taxes payable by the purchaser were 1*l.* 8*s.* 2*d.* annually more than they would have been on a valuation of 67*l.* : *Ex parte Guinness*, 1880, 5 L. R. Ir. 616.

A misstatement in the particulars as to the amount of the drainage rates is not covered by a condition "the description of the several lots in the particulars is believed and shall be deemed to be correct, and no objection shall be made or compensation claimed for any error of description as to quantity or otherwise," these words referring to physical description only : *Rose and Carr*, Buckley, J., 7 Feb. 1901.

A condition for compensation if any lot "should be improperly described or any error or misstatement be made in this particular" was construed as applying to errors in the particulars and as covering a misstatement of the fines : *White v. Cuddon*, 1842, 8 Cl. & F. at p. 784. Compensation was not decreed, as on the whole the profits had not been overstated. The construction of the condition was aided by the mode of compensation provided by the condition—viz. a *pro rata* deduction from the price which, the property sold being a manor, apparently was to be fixed by the annual profits.

An underground culvert which could only have been discovered by going on to adjoining property or walking along a road from which the property was visible was held not to be within a condition "the property is believed and shall be taken to be correctly described, and being open to inspection the purchaser shall be deemed to buy with full knowledge of the actual quantities and condition thereof. If any error shall be found in the particulars" (no compensation), as this condition only applied to such matters as might be discovered by an inspection of the property itself : *Puckett and Smith*, (1902) 2 Ch. at p. 265.

On a sale of land containing 40 acres more or less, "delineated in the plan and edged with the colour pink," a condition allowing the vendor compensation "if any mistake or omission should be made in the description of the property" does not enable the vendor to get compensation if the land measures 1*a.* 1*r.* 10*p.* more, the plan itself being free from ambiguity : *Orange to Wright*, 1885, 51 L. J. Ch. 590.

If the condition embraces in terms only "errors and misstatements," or "misdemeanors," a question might arise whether a mere omission would be within the condition. The actual decision in *Manson v. Thacker*, 1878, 7 Ch. D. 620, might, perhaps, be upheld on the ground that the non-mention of the hidden culvert was an "omission," and not an "error" or "misstatement," and that the condition did not expressly include "omissions."

If the vendor or his solicitor has deceived the purchaser by a *verbal* misrepresentation, the purchaser could probably recover his deposit notwithstanding a condition refusing compensation for "any incorrect statement, error, or omission found in the particulars or these special conditions": see *Nottingham, &c. v. Butler*, 1886, 16 Q. B. D. 777 (where, however, the construction of the condition was not adverted to in the judgments).

An immaterial omission, *e.g.* the omission to mention a paving notice, does not entitle the purchaser to compensation under a condition allowing compensation for an "omission in the particulars": *Leyland and Taylor*, (1900) 2 Ch. 625, see above, p. 39.

(iii) *Condition allowing Compensation to the Purchaser*

It is convenient to consider the effect of a condition allowing compensation to the purchaser under the heads of (a) the vendor seeking to enforce specific performance with compensation, (b) the purchaser suing for his deposit and expenses, and (c) the purchaser seeking to enforce the condition for compensation. Except where the words of the condition are specially adverted to, the wording of the condition used in the reported cases may be taken to be unimportant; the usual form of the condition (stated briefly) being "errors and misstatements shall not annul the sale, but shall entitle the purchaser to compensation."

(a) *Vendor enforcing specific performance*

The employment by the vendor of a condition allowing compensation to the purchaser will not enable the vendor to enforce specific performance with compensation if the vendor has been guilty of fraud or the misstatement or defect in title was essential or was such that compensation cannot be fairly assessed.

(a) Vendor enforcing specific performance.

This rule is sometimes put as a question of construction ; but the fact is the Court simply puts the condition on one side. That it is not a question of construction would seem clear from the fact that where the purchaser desires to enforce the condition the essentiality of the misdescription or defect is not taken as showing that the condition was not meant to apply ; thus, in *Painter v. Newby*, 1853, 11 Ha. 26, an essential defect of title—viz. the absence of a right of renewal of a lease—was held to be within the condition.

The extent to which certain undisclosed easements affected the property, the importance of the easements, and the fact that the vendor, in misdescribing the property, had been negligent in the performance of his duty, were considered as having weight in determining whether the condition for compensation applied or not : *Shackleton v. Sutcliffe*, 1847, 1 De G. & Sm. 609.

The questions, what is an essential misdescription, and can compensation be assessed, have been discussed in detail at pp. 78 to 94, and 107 to 122. The cases mentioned below are cases in which there were conditions allowing compensation to the purchaser, but all the cases mentioned above, pp. 81 to 94, would appear to be relevant on this point. It would seem that the existence of a condition for compensation does not materially improve the vendor's position. It is possible, however, that, in a case where it was doubtful whether the misdescription was essential or not, the existence of a condition that misstatements should not annul the sale, but compensation be allowed, might turn the scale in favour of the vendor. And in cases where the possibility of assessing compensation is doubtful, the fact that the conditions point out a method of assessment has sometimes induced the Court to decree compensation : see above, p. 111.

The description of copyhold property as “ freehold ” is non-essential if the fines, reliefs, and heriots are fixed and nominal, and the right to the minerals and timber is in the tenant : *Price v. Macaulay*, 1852, 2 D. M. & G. 339, 344.

The description of an under-lease as a “ lease ” is essential : *Madeley v. Booth*, 1848, 2 De G. & Sm. 718.

The description "in the joint occupation of A. and B. as lessees" is an essential misdescription if A. and B. are in occupation but not as lessees : *Ridgway v. Gray*, 1849, 1 Mac. & G. 109.

The description of a fifty feet long wharf as sixty feet long is an essential matter, as a wharf only fifty feet in length is almost useless as a wharf, most barges being sixty feet long : *Deptford Creek, &c. and Beavan*, 1884, 28 Sol. J. 327.

A deficiency of 339 square yards out of 1372 square yards where the land bought was fenced off and consisted of a house, yard, and buildings, was held to be non-essential : *Fawcett and Holmes*, 1889, 42 Ch. D. 150.

Where four and a-half out of thirty acres sold as "eligible for building purposes" turned out to be subject to a right to third parties to open, cleanse, and repair an underground watercourse therein, making compensation for damage, the misdescription was held to be essential : *Shackleton v. Sutcliffe*, 1847, 1 De G. & Sm. 609. But where land was *not* sold as building land, the existence of a public sewer and manhole in the garden, with a right for the local authority to enter to repair the sewer, was held not to be an essential defect : *Brewer and Hankin*, 1899, 80 L. T. 127.

The description of a farm as "lately in the occupation of H. at an annual rent of 290*l.*, now in hand," the facts being that H. had held the farm for one year at 290*l.* but had had it for the first quarter for 1*l.* only, thus paying 291*l.* for a year and a-quarter and had then left, and the vendor had agreed to let the farm to N. at 225*l.* but had afterwards cancelled this agreement, was held to be an essential misdescription : *Dimmock v. Hallett*, 1866, 2 Ch. 21.

(b) *Purchaser suing for deposit and expenses*

If the vendor has been guilty of fraud, or if the misdescription or defect in title is essential (see pp. 78 to 94, above) or such that compensation cannot be fairly assessed (see pp. 107 to 122, above), the purchaser may, notwithstanding the condition, rescind and recover his deposit and the expenses of the sale.

(b) Purchaser suing for deposit.

It is quite clear that the vendor's fraud will enable the purchaser to recover the deposit notwithstanding a condition that a

misdescription "shall not annul the sale but shall be the subject of compensation" : *Norfolk v. Worthy*, 1808, 1 Camp. 337.

Apart from authority, it might have been thought that an innocent misdescription, even in an essential matter, stood on a different footing. In what appears to be a similar case, that of a condition precluding the purchaser from objecting to a defect in title, the law is that, though the defect in title may be essential so that the vendor cannot enforce specific performance, in fact, even if it is the extreme case of a vendor having no title at all, yet the condition precludes the purchaser from recovering his deposit : *Scott and Alvarez*, (1895) 2 Ch. 603. The leading case which decides that an essential misdescription will entitle the purchaser to recover his deposit notwithstanding the condition for compensation is *Flight v. Booth*, 1834, 1 Bing. N. C. 370, where Tindal, C. J. (at p. 377), says : "Where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract, that it may be reasonably supposed that, but for such misdescription, the purchaser might never have entered into the contract at all ; in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation." This passage was cited with approval in *Davis and Carey*, 1888, 40 Ch. D. 601, and *Fawcett and Holmes*, 1889, 42 Ch. D. 150. In *Flight v. Booth*, the cases of *Norfolk v. Worthy*, 1808, 1 Camp. 337, and *Wright v. Wilson*, 1832, 1 Moo. & R. 207, which laid it down that with such a condition no misstatement, however important, would vitiate the sale unless it arose through fraud, were considered and contrasted with the cases of *Jones v. Edny*, 1812, 3 Camp. 285 ; *Waring v. Hoggart*, 1823, Ry. & M. 39 ; and *Stewart v. Allison*, 1815, 1 Mer. 26. But in *Jones v. Edny* and *Waring v. Hoggart* there appears to have been no condition for compensation, and *Stewart v. Allison* was not the decision of a Court of common law in an action by the purchaser to recover his deposit, but the decision of a Court of equity refusing to grant the vendor an injunction restraining the purchaser from suing at law for his deposit. The right of the purchaser to recover his deposit depends on common law principles, and though a Court of equity

might refuse an injunction to restrain the purchaser from suing for his deposit, it does not follow that a Court of law would, in the same case, allow the purchaser to recover his deposit. On common law principles, a man who has made a bargain is held to it even if the bargain is hard or unfair, and if a purchaser has agreed that no misdescription shall annul the sale, then, though a Court of equity may refuse to enforce specific performance with compensation because the misdescription was too serious to allow of compensation, still a Court of law ought not to go further and, treating the vendor as having broken his contract, allow the purchaser to recover his deposit. Of course, if the Court, on the construction of the conditions, holds that essential errors and misdescriptions are *not covered* by the condition, this is a different matter. And this, according to Lord Esher in *Fawcett and Holmes*, 1889, 42 Ch. D. p. 156, is the *ratio decidendi* of *Flight v. Booth*. According to Lord Esher's view, not only are fraudulent misdescriptions and misdescriptions for which compensation cannot be computed excluded from such a condition, but all misdescriptions which "go to the essence of the contract and materially alter the substance of it" are likewise not covered by the condition. This view, if correct, would leave it open to the Court on a future occasion to construe the special condition before it as covering essential misdescriptions, and to hold that the purchaser could not recover his deposit. However, it appears on the whole to be now settled that an essential misdescription, even if covered by a condition for compensation, entitles the purchaser to recover his deposit and the expenses of the sale, notwithstanding a condition that "no error or misdescription shall annul the sale, but compensation shall be allowed." An essential misdescription is considered as justifying the purchaser in saying that the property which the vendor is ready to convey is not the property which he purchased (*Dykes v. Blake*, 1838, 4 Bing. N. C. at p. 477), or, to put it in a slightly different way, the misdescription is such that "the purchaser may be considered as not having purchased the thing which was really the subject of the sale": *Flight v. Booth*, 1834, 1 Bing. N. C. at p. 377. Or, as it is put by Lindley, L. J., in *Terry and White*, 1886, 32 Ch. D. at p. 29, "the

fraud or misrepresentation if sufficiently serious vitiates the whole contract, including the condition in question."

Fraud.

The following are instances of cases where the Court has, on the ground of the vendor's fraud, disregarded the condition for compensation and allowed the purchaser to recover his deposit :

Where the vendor fraudulently represented the distance of the property from the nearest town as about one mile when it was really between three and four miles : *Norfolk v. Worthy*, 1808, 1 Camp. 337.

Where the description "substantial brick building" was considered as exaggerated beyond the truth, and the vendor as not acting *bonâ fide* when he gave the description : *Robinson v. Musgrove*, 1838, 2 Moo. & R. 92.

Essential mis-
description.

The following are instances of cases where the Court, on the ground of essential misdescription or defect in title, has disregarded the condition for compensation and allowed the purchaser to recover his deposit. Other instances of essential misdescriptions and defects (where there was no condition) will be found at pp. 81 to 94, where the cases in which the purchaser has recovered his deposit are distinguished.

Where the property was described as a leasehold house and yard, the fact being that the yard was not comprised in the lease but only held on a yearly tenancy : *Dobell v. Hutchinson*, 1835, 3 A. & E. 355.

Where land sold as building land was subject to an undisclosed right of way : *Dykes v. Blake*, 1838, 4 Bing. N. C. 463.

Where the only access to the house sold was through another house by a passage which was not reasonably secure and commodious : *Stanton v. Tattersall*, 1 Sm. & Gif. 529.

Where a rack rent was described as a "ground rent" : *Stewart v. Alliston*, 1 Mer. 26 (where an injunction to restrain the purchaser from suing for his deposit was refused).

Where a sum in gross merely secured by a personal covenant was described as a "freehold ground rent" : *Robins v. Evans*, 1863, 2 H. & C. 410. It was said in this case that the condition for compensation would have applied if the only error in the description had been the word "freehold," and the rent had

actually issued out of the premises ; but this seems doubtful as the misdescription of the tenure is essential : see above, p. 82.

Restrictive covenants are essential defects : *Flight v. Booth*, 1834, 1 Bing. N. C. 370 ; *Phillips v. Caldclough*, 1868, L. R. 4 Q. B. 159.

On the sale of a reversion expectant on A.'s death without children, a misrepresentation of A.'s age is essential : *Sherwood v. Robins*, 1828, Moo. & Mal. 194.

Even if the condition for compensation applies the vendor cannot avail himself of the condition after the purchaser has brought his action for the deposit, if all along the vendor has contended that there was no misdescription or defect in title : *Evans v. Robins*, 1862, 1 H. & C. 302 (this point not mentioned in 2 H. & C. 410).

Vendor
denying the
misdescription.

(c) *Purchaser seeking to enforce the condition*

In the case of a misdescription or a defect in title covered by the condition, the purchaser is entitled to specific performance with compensation even though the misdescription or defect is essential.

Thus where leaseholds were described as "renewable every twenty-one years," the fact being that there was no right of renewal, the purchaser was held entitled to specific performance with compensation under a condition "If through any mistake the estate should be improperly described," &c. : *Painter v. Newby*, 1853, 11 Ha. 26.

And in cases where but for the condition the Court might incline to the view that compensation cannot be assessed fairly the condition for compensation might turn the scale, especially if the condition points out a means of assessing compensation : see *Leslie v. Tompson*, 1851, 9 Ha. at p. 274 ; *Rudd v. Lascelles*, (1900) 1 Ch. at p. 820, and other cases mentioned above, p. 111.

If the condition allowing compensation to the purchaser is not limited to errors discovered before completion, the condition will be enforced even where the error has not been discovered until after completion : *Cann v. Cann*, 1830, 3 Sim. 447 ; *Bos v. Helsham*, 1866, L. R. 2 Ex. 72 ; *Turner and Skelton*, 1879, 13 Ch. D. 130 ; and *Palmer v. Johnson*, 1884, 13 Q. B. D. 351. In *Manson v.*

Thacker, 1878, 7 Ch. D. 620, Malins, V.-C., decided otherwise; and in *Allen v. Richardson*, 1879, 13 Ch. D. 524, the same Judge expressed his approval of his own view, and his disapproval of that of Jessel, M. R., in *Turner and Skelton*. The reasons given for the decision in *Bos v. Helsham* are—(1) that the condition was inserted in order to avoid any inquiry involving delay into the value of the property or its rental; (2) that it could easily have been limited to errors before completion, if that had been the vendor's intention; and (3) that the execution of the conveyance would not preclude the parties because there was an express contract between them from which the right to sue sprang. An additional reason is given in *Turner and Skelton*—viz. that where the error is one of quantity the purchaser could not, by due diligence, discover it before completion, except by the permission of the vendor, which permission the vendor is not bound to give. The principle (laid down in *Leggott v. Barrett*, 1880, 15 Ch. D. at pp. 309, 311, and referred to in *Squire v. Campbell*, 1836, 1 My. & Cr. p. 479) that when an executory contract is afterwards reduced into a deed, the former merges, and the rights of the parties are determined wholly by the deed, is inapplicable because the conveyance is intended to carry out only a part of the contract for sale, and is not designed to supersede the contract for compensation.

After time for
requisitions.

If the condition is not limited to defects pointed out before the time fixed for sending in requisitions, the purchaser may, it is suggested, in the case of defects in the condition of the property as distinguished from defects in title, obtain compensation under the condition although he is too late to send in requisitions—unless indeed the condition as to requisitions expressly covers defects in the property or misstatements in the particulars. This seems to be a corollary of the rule in *Bos v. Helsham* (see preceding paragraph). Cf. *Price v. Macaulay*, 1852, 2 D. M. & G. 339, stated above, p. 269.

Hardship to
the vendor.

A condition for compensation has in some cases been enforced by the Court at the instance of the purchaser under circumstances in which the Court would, on the ground of hardship to the vendor, have refused to decree specific performance with compensation if there had been no condition. Thus, in *Painter v.*

Newby, 1853, 11 Ha. at p. 30, the property was described as "customary leasehold held of the lord of the manor of B., and renewable every twenty-one years on payment of the customary fine at an annual rent of ten shillings," and it was afterwards discovered that there was no custom of renewing: it was held that the condition for compensation prevented the cases of hardship from applying, and that the purchaser was entitled to compensation. See also *Aspinalls to Powell*, 1889, 60 L. T. 595, stated above, p. 104.

Another result of the employment by the vendor of a condition for compensation is suggested by some remarks of Kay, J., in *Lett v. Randall*, 1883, 49 L.T. 71—namely, that where the defect is known to the purchaser at the date of the contract, and is therefore one for which he can obtain no relief (see above, p. 211), the condition for compensation will nevertheless enable him to obtain compensation. In that case the vendors had described the property as let on lease for seventy-five years from 1850, the fact being that the term commenced in 1858, and would therefore last eight years longer than was thought. Kay, J., expressed his opinion that the purchaser did not actually know the description was wrong, but added that, even if he did, the vendors were bound to give compensation, because their contract was, "We will sell our property for so much, and part of our contract is, that if we have misstated anything in the conditions of sale, you shall have compensation for that misstatement." The argument (see the judgment) that the purchaser had paid a higher price owing to the misdescription, because even if the purchaser knew of the mistake the other bidders did not, and, being influenced by the description, bid higher than they would otherwise have done, seems fallacious. If the purchaser had chosen, he could have asked for information as to the defect at the auction, which, being given to him openly would have opened the eyes of the other bidders. Either the purchaser was content to give the price he offered, in which case he wanted no compensation because he had suffered no damage; or he paid more in the expectation of obtaining compensation, in which case he committed a fraud on the vendors. In the case of *Camberwell, &c. v. Holloway*, 1879, 13 Ch. D. 754, Jessel, M. R.,

Defect
known to
purchaser.

held that a purchaser who had notice that property described as a lease was only an under-lease, was not entitled to compensation under a condition allowing compensation "if any error or mistake shall appear in the description or in the nature or quality of the vendor's interest therein." It is true that the learned Judge said also that the word "lease" was only ambiguous, and therefore no actual misdescription had occurred; but, as is pointed out by Bowen, L. J., in *Beyfus and Masters*, 1888, 39 Ch. D. at p. 115, this was only *dictum*, and it is clear that Jessel, M. R., thought that the effect of the purchaser's knowledge or notice was to make the condition for compensation inapplicable.

Condition for
rescission.

If the condition for rescission does not expressly enable the vendor to rescind in case of a requisition being made for compensation, a question may arise whether the purchaser is entitled to compensation under the condition for compensation or the vendor to rescission under the condition for rescission. This question is discussed below, p. 361.

(iv) *Conditions refusing Compensation to the Purchaser*

The effect of a condition refusing compensation to the purchaser requires to be considered under the separate heads of (a) the vendor seeking to enforce the contract *without* compensation; (b) the purchaser seeking to enforce the contract *with* compensation; and (c) the purchaser suing for his deposit and expenses.

(a) *Vendor's action for specific performance*

A condition that there shall be no compensation cannot be relied on by the vendor as enabling him to compel the purchaser to complete without compensation, if the vendor has been guilty of fraud in the matter, or if there has been an essential misdescription or the title is defective in an essential matter: *Portman v. Mill*, 1826, 2 Russ. 570. The question what is "essential" is discussed above, p. 78.

In *Portman v. Mill*, 2 Russ. 570, a farm of 249 acres was described as "containing by estimation 349 acres, or thereabouts,

be the same more or less," and there was a stipulation that the parties should not be answerable for any excess or deficiency in the quantity, and that such excess or deficiency should not vacate or affect the contract, but that the premises should be taken at the quantity stated, whether more or less.

The words "the property being open for inspection, the purchaser shall be deemed to buy with full knowledge of the actual quantities and condition thereof" will not enable the vendor to force the purchaser to complete where he has with the vendor's knowledge bought for the purpose of building, and there is a culvert which he could not have discovered by any reasonable careful inspection: *Puckett and Smith*, (1902) 2 Ch. 258.

(b) *Purchaser's action for specific performance*

A condition that there shall be no compensation, though it may be inadequate to enable the vendor to insist on specific performance *without* compensation, will be sufficient to preclude the purchaser from insisting on specific performance *with* compensation: *Terry and White*, 1886, 32 Ch. D. 14.

In the older cases this difference of treatment of the condition was regarded as a difference in the mode of construing the condition; see, for instance, *Cordingley v. Cheeseborough*, 1862, 4 D. F. & J. at p. 384. But it is not, properly speaking, a question of construction; it is rather a principle of equity, that, notwithstanding the conditions of sale, the vendor shall not have specific performance if he have materially misled the purchaser. See the judgments of Lord Esher, M. R., and Cotton, L. J., in *Terry and White*, 1886, 32 Ch. D. 14.

In *Phillips v. Miller*, 1875, L. R. 10 C. P. 420, reversing 9 C. P. 196, the purchaser was allowed compensation notwithstanding this condition; but this was in pursuance of a subsequent agreement between the vendor and purchaser entered into at the time of completion. See p. 204 of the report in 9 C. P.

(c) *Purchaser suing for deposit and expenses*

The right of the purchaser to recover his deposit in the teeth of a condition that "errors shall not annul the sale, and no

compensation shall be allowed," depends (in the absence of the vendor's fraud) on the wording of the condition and the nature of the error. The vendor's fraud would, of course, enable the purchaser to recover his deposit and expenses, as this is an *à fortiori* case compared with the case of a condition allowing compensation, as to which see above, p. 287.

And it would seem on the whole, though the authorities are not quite clear, that the deposit, and also it would seem expenses, can be recovered in the face of such a condition on the ground of an essential misdescription or essential defect in title, even in the absence of fraud. The deposit was recovered in *Jacob v. Revell*, (1900) 2 Ch. 858, merely on the ground of essential misdescription. In that case the property was described as containing 5a. 0r. 26p. and as bordering on a lake on the S. common; the vendor showed title only to 4a. 3r. 0p., the part in respect of which the vendor's title was defective being a strip of land bordering on the lake.

Where a house which was subject to an easement in favour of the owner of a neighbouring tenement to use the kitchen for particular purposes was sold with no mention of the easement, this was held to be an essential defect, and the purchaser recovered his deposit notwithstanding a condition refusing compensation for "any error, misstatement, or omission": *Heywood v. Mallalieu*, 1883, 25 Ch. D. 357.

And a statement on the sale of a dwelling-house that the water supply was derived from adjoining premises on payment of 2s. 6d. per annum (the fact being that the supply was on sufferance only) was held to be an essential misdescription, and the purchaser recovered his deposit and expenses, in spite of a condition that a misdescription should not annul the sale nor compensation be allowed: *Evershed and Campion*, Kekewich, J., 9 Nov. 1900.

But the condition, "the quantities of the land shall be taken as stated, whether more or less (although the title deeds state such quantities to be less), without any equivalent or compensation on either side," was considered sufficient to preclude the purchaser from recovering the deposit, although the property was described as containing 1a. 2r. 8p., and the title deeds gave

the quantity as 3r. 22p. only : *Nicoll v. Chambers*, 1852, 11 C. B. 996.

Where an under-lease was sold as a lease, it was held by Kay, J., that in spite of a condition refusing compensation the purchaser was entitled (in case the vendor failed to procure an assignment of the original term) to rescind and recover his deposit, and the costs of investigating the title ; the vendor's appeal was dismissed on the ground that the vendor had not shown a good title, and that the condition did not cover the defect, but Cotton, L. J., doubted whether the order of Kay, J., did not go too far in ordering the rescission of the contract : *Beyfus and Masters*, 1888, 39 Ch. D. 110.

The better opinion, however, seems to be that as in cases where the condition allows compensation, so in cases where the condition refuses compensation, the purchaser is entitled to recover his deposit and expenses notwithstanding the condition. In fact, the case is stronger in favour of the purchaser where there is a condition excluding compensation : *Jacobs v. Revell*, (1900) 2 Ch. 858, 864.

The purchaser's right to compensation, under a condition allowing compensation in case of an "error or misdescription," is not precluded by a condition that "the purchaser of lot 2 shall not object to complete his purchase if the quantity should turn out less than that stated in the particulars" : *Frost v. Brewer*, 1839, 3 Jur. 165. Inconsistent conditions.

In *Whittemore v. Whittemore*, 1869, 8 Eq. 603, property containing 573 square yards was described as containing 753 square yards. It was a sale under a decree, and there were two conditions relating to compensation, one that no compensation should be allowed in respect of errors as to quantity, and another providing for compensation "except as to matters in respect whereof the right to compensation is hereby excluded." The Court held that the purchaser was entitled to compensation.

As to the conflict between a condition refusing compensation and a condition for rescission, see below, p. 361.

(v) *Condition allowing Compensation to the Vendor*

The effect of a condition allowing compensation to the vendor would seem to be as doubtful as the law itself is in the absence of stipulation. On the whole the tendency of modern decisions being to let the parties make their own contracts, the condition would probably hold good, at least to the extent of preventing the purchaser from recovering his deposit or obtaining specific performance without compensating the vendor.

The only case known to the author in which compensation has been allowed to the vendor under such a condition is *Leslie v. Thompson*, 1851, 9 Ha. 268. There property had been sold in lots, the acreage of one lot was more than that given in the particulars, and the acreage of three other lots was less than the description. The order made was : Declare the purchaser bound to make compensation in respect of lot (1), and entitled to receive compensation in respect of lots (2), (3), and (4). The excess in lot (1) was greater than the aggregate deficiency in lots (2), (3), and (4) ; so the vendor probably obtained an increase of the purchase money. The remarks of Turner, V.-C., in that case, p. 273, show that what was actually decided was that, in the face of a condition allowing compensation to the vendor, the purchaser cannot enforce specific performance without compensation ; his only remedy is rescission. This leaves it doubtful whether the vendor could enforce the condition for compensation—*i.e.* could compel the purchaser to complete, giving compensation, when the purchaser would prefer to rescind.

If the excess is very large, the purchaser would, it is conceived, be allowed to rescind if he preferred it, notwithstanding the condition. Thus, in *Price v. North*, 1837, 2 Y. & C. Ex. 620, the vendor described his property as containing 14 acres, whereas it really contained 27 acres. The Court held that the purchaser could not be compelled to pay additional purchase money, chiefly on account of the vendor's delay, but also because " such a misdescription would not be ground for modifying the contract but for avoiding the sale altogether." The wording of the condition in that case (that an error " should be the subject of

compensation") would also appear to be too vague to be enforced.

A condition that errors, &c., "shall not annul the sale, but a compensation shall be given or taken," was construed as referring only to such errors as on the part of the vendors would vitiate or annul the contract for sale—in other words, such as would entitle the vendor to rescind : per Turner, V.-C., in *Leslie v. Thompson*, 1851, 9 Ha. at p. 273. Whether the vendors would have been entitled to rescind in that case the learned Judge considered doubtful, though he was disposed to think that as they had acted with ordinary prudence and had made the mistake through relying on a surveyor's report, they would be entitled to be relieved. But, it is conceived, the carefulness of the vendors does not really affect the question whether they are entitled or not to enforce their condition for compensation.

Where property having a frontage of 69 feet 6 inches was described as "about 63 feet frontage," the Court considered this was not such a misdescription as to entitle the vendor to compensation under a condition that in case of any error, misstatement, or misdescription, the same should not annul the sale, but compensation should be given or allowed : *Bourne v. London, &c. Co.*, 1885, W. N. 109.

(vi) *Assessment of Compensation*

The assessment of compensation by the Court is considered above, pp. 107 *et seqq.*

The effect of an agreement that the amount of compensation shall be determined by valuation is considered above, p. 111.

CHAPTER XXIII

CONDITIONS RELATING TO COMPLETION

	PAGE		PAGE
(i) Time for Completion	301	(vi) Rate of Interest	328
(ii) Payment of Purchase Money	314	(vii) Appropriation	329
(iii) Interest payable, in what cases	316	(viii) Income Tax	333
(iv) Time from which Interest payable	324	(ix) Possession	333
(v) Interest, payable on what	327	(x) Rents and Profits	337
		(xi) Outgoings	343
		(xii) Deterioration	347
		(xiii) Improvements	353

COMPLETION means, as against the purchaser, the payment of the purchase money ; as against the vendor, the execution and delivery of the conveyance after showing a complete title according to the contract, and giving the purchaser possession if the contract is that he shall have possession. “ Completion means the delivery of the conveyance on the one side, and the payment of the purchase money on the other ” : Romilly, M. R., in *Hudson v. Temple*, 1860, 29 Beav. at p. 543.

The fixing a day for “ possession ” will in the absence of an inconsistent condition (*e.g.* a condition contrasting possession and completion) mean as against the vendor that he is to complete on that date, at least, that he is to give possession with complete title previously shown : *Tilley v. Thomas*, 1867, 3 Ch. 61. A receipt for the deposit providing for its return “ in the event of the sale not being *completed*,” was treated as not inconsistent with this meaning of “ possession,” and the word “ completed ” in the receipt was construed as referring to the date fixed by the contract for possession : *Ibid*.

A condition that the purchase money should remain on deposit “ until the completion of the purchase ” and providing for the payment of interest “ until the purchase shall be

completed," means until the purchase money is paid : *Lewis v. South Wales Ry. Co.* 1852, 10 Ha. 113.

(i) TIME FOR COMPLETION

If no time is fixed by the conditions, a reasonable time is allowed for completion : *Sansom v. Rhodes*, 1840, 8 Scott, 544. No time fixed.

Where the contract for the sale of a house was made on the 17th of April and the 24th of June was fixed for delivery of possession, it was held that, having regard to the nature of the property and to the stipulation about possession, the 24th of June was a reasonable time for completion : *Bellamy v. Debenham*, (1891) 1 Ch. 419.

If the property is of such a nature that time, if fixed, would be regarded as of the essence of the contract, then, if no time is fixed, the purchaser may fix a reasonable time for completion, and on the vendor's default rescind : *Macbryde v. Weekes*, 1856, 22 Beav. 533.

On a sub-sale, the words "on the same terms as to title &c. as the vendor purchased" do not incorporate the date for completion or the condition as to payment of interest contained in the original contract of sale. The contract is left open and a reasonable time allowed : *Keeble and Stillwell's, &c.*, 1898, 78 L. T. 383.

If the conditions fix a date for completion by the purchaser, this does not necessarily fix the date for completion by the *vendor*. Thus, where the conditions stipulated that the purchase money was to be paid on or before the 28th November, but did not fix any time for completion by the vendor, it was held that the vendor was not bound to complete on the 28th November : *Sansom v. Rhodes*, 1840, 8 Scott, 544. On the other hand, where by the contract a day was fixed for "possession," but no day was fixed for completion, a receipt for the deposit providing for its return "in the event of the sale not being completed" was held to refer to the day fixed for possession : *Tilley v. Thomas*, 1867, 3 Ch. 61. Time fixed.

A contract, dated 15th December, fixed "the 28th of December next" as the date for completion; this was construed as

meaning the next 28th of December, not the 28th of next December : *Daves v. Charsley*, 1886, W. N. 37, 78. See *Brown v. Smith*, 1840, 8 Dowl. 867.

On the sale of a term of five years unexpired, subject to the sanction of the Court to a building agreement between the purchaser and the freeholder (which was not in fact obtained till June 1900) the words "possession to be given upon settlement before Christmas 1899 and within 21 days after the approval of the Court to the building agreement" were construed as providing for completion at Christmas 1899 or 21 days after the approval of the Court, whichever was the later date : *Stott and Rust*, Buckley J., 5 Feb. 1901.

Time made
essential by
conditions.

The time fixed for completion will be essential if the conditions provide that "time shall be of the essence" (*Lloyd v. Rippingale*, 1 Y. & C. Ex. at p. 410); or that "if from any cause whatever the purchase be not completed by" the day fixed, "the vendor shall be at liberty to annul the contract" (*Hudson v. Temple*, 1860, 29 Beav. 536); or that "the contract shall be void if not performed by (the day fixed)" (*Hudson v. Bartram*, 1818, 3 Mad. 440); or that "if the title shall not be perfected within the time aforesaid, the purchaser shall be released from his contract" : *Hipwell v. Knight*, 1835, 1 Y. & C. Ex. 401. Similarly time is made of the essence by an agreement that if the purchase money is not paid by a given day, "or upon such deferred date as the parties may agree upon, the contract shall be void" : *Barclay v. Messenger*, 1874, 43 L. J. Ch. 449.

If, in the conditions, the vendor makes time of the essence in some matters, the Court will be more inclined to regard time as essential in other matters against the vendor : *Seaton v. Mapp*, 1846, 2 Coll. 556. But in favour of the purchaser the Court regards a condition making time essential in respect of one matter (e.g. sending in requisitions) as raising a presumption that time was not intended to be essential as regards completion generally : *Wells v. Maxwell*, 1863, 32 Beav. 408.

Time essen-
tial through
circum-
stances.

Time is of the essence, where the nature of the property or the surrounding circumstances are such that it must have been the intention of the parties that time should be essential.

Time is of the essence on account of the vendor :

(a) On the sale of a reversion : *Newman v. Rogers*, 1793, 4 Bro. Ch. C. 391. For no man sells a reversion who is not distressed for money, and the purchaser who delays completion has an unequal advantage, because he brings the reversion nearer to its enjoyment without increasing the purchase money : see note by Belt on that case.

(b) Where the vendor, to the purchaser's knowledge, requires the money by a certain day for the purpose of paying off a mortgage : case before Lord Rosslyn, cited 2 Sch. & Lef. 604.

(c) On an agreement for a lease, where the lessors are a fluctuating body, and part of the consideration for the lease is a fine, because in that case if completion is delayed the persons who receive the benefit under the contract may differ from those who actually contracted : *Carter v. Dean of Ely*, 1835, 7 Sim. 211.

(d) On the sale of the vendor's interest in a public house sold as a going concern, where the vendor is a tenant from year to year ; because the vendor incurs a fresh liability, and the value of the property may diminish : *Coslake v. Till*, 1826, 1 Russ. 376.

(e) Time is essential where the property sold is of wasting or fluctuating value. Thus, in the case of mines, on an agreement for a lease, time is of the essence (per Lord Eldon, in *City of London v. Mitford*, 1807, 14 Ves. at p. 58), even though no time is named : *Macbryde v. Weekes*, 1856, 22 Beav. 533. So, on the sale of a life annuity : *Withy v. Cottle*, 1823, T. & R. 78. Or of a leasehold whereof only a short time remains unexpired : *Hudson v. Temple*, 1860, 29 Beav. at p. 543.

Time is of the essence on account of the purchaser :

(a) On the sale of a public house as a going concern : *Cowles v. Gale*, 1871, 7 Ch. 12 ; *Day v. Luhke*, 1868, 5 Eq. 336 ; *Claydon v. Green*, 1868, L. R. 3 C. P. 511 ; *Weston v. Savage*, 1879, 10 Ch. D. 736 ; and *Tadcaster, &c. v. Wilson*, (1897) 1 Ch. 705. But not on the sale of a public house not as a going concern : *Farnham, &c. v. Hunt*, 1893, 68 L. T. 440.

(b) Where the property is intended for the purposes of trade, as on an agreement for a lease of a coal mine, &c. : *Parker v. Frith*, 1819, 1 S. & S. 199 n.

(c) On the sale of a dwelling house when the purchaser intends to reside there, provided the vendor knows of the purchaser's intention: *Tilley v. Thomas*, 1867, 3 Ch. 61. If the vendor does not know of the purchaser's intention, and there is nothing in the contract to show that the purchaser intended to reside in the house, the purchaser's intention will not be sufficient to make time essential: *Boehm v. Wood*, 1820, 1 J. & W. at p. 422. Time is not necessarily of the essence if the purchaser does not require the house for his own immediate occupation: *Dyer v. Hargrave*, 1805, 10 Ves. 508. Nor is time necessarily of the essence on a sale of land for building a dwelling house: *Wells v. Maxwell*, 1863, 32 Beav. 408.

(d) On the sale of an agreement for a building lease where the time for completing the building is limited: *Brewer v. Broadwood*, 1882, 22 Ch. D. 105.

But in a sale where, on account of the subject-matter, the Court would hold time to be essential, the conditions, and especially a condition for the payment of interest, may show that this was not the intention of the parties, and in that case neither party will be held bound to complete on the day fixed.

Thus, on the sale of a house required (as the vendor knew) for residence, a condition provided that "if from any cause whatever the purchase should not be completed on the day fixed, the purchaser should pay interest on the purchase money": this stipulation was held to show that time was not essential: per Malins, V.-C., in *Webb v. Hughes*, 1870, 10 Eq. at p. 286; and Kay, J., in *Hatten v. Russell*, 1888, 38 Ch. D. at p. 341.

And even where the condition as to payment of interest by the purchaser is made without prejudice to the vendor's right under another condition—viz. that "the deposit shall be forfeited if the purchaser fails to comply with the conditions"—the condition for payment of interest shows that time is not meant to be essential: *Patrick v. Milner*, 1877, 2 C. P. D. 342 (sale of contingent reversion).

Although time was not originally of the essence of the contract, yet if one party has been guilty of delay, the other party may, by means of a notice, make time of the essence: *Parkin v.*

Thorold, 1852, 16 Beav. 59; *Green v. Sevin*, 1879, 13 Ch. D. 589; *Compton v. Bagley*, (1892) 1 Ch. 313. But the notice must give an extended time; it must not determine the contract immediately: *Taylor v. Brown*, 1839, 2 Beav. 180. And the right to make time of the essence by giving notice does not arise unless the other party has been guilty of delay. "You cannot make a new contract at the will of one of the contracting parties": per Fry, J., in *Green v. Sevin*, 1879, 13 Ch. D. at p. 599.

The notice should distinctly state that if the notice is not complied with, the party sending it will rescind or treat the contract as at an end; the mere statement "if you make default (on the day specified) I shall consider you as refusing to perform your agreement, and act accordingly," is insufficient: *Reynolds v. Nelson*, 1821, 6 Mad. 18. The words "in default of, &c., I shall consider the agreement at an end," are sufficiently explicit: *Macbryde v. Weekes*, 1856, 22 Beav. 533.

The time fixed in the notice must be reasonable, having regard to the amount of work to be done and to the previous conduct of the person to whom the notice is given and of the person sending the notice. For instance, sufficient time must be allowed by the vendor for the verification and examination of the abstract, for sending in requisitions, the engrossment of the conveyance, &c., if these have not been done. Five weeks' notice by the vendor is unreasonably short if the abstract of title is complicated, and the requisitions have not been sent in, especially if the five weeks occur in the Long Vacation: *Crawford v. Toogood*, 1879, 13 Ch. D. 153. A fortnight's notice by the purchaser was insufficient when the vendor, in order to complete his title, had to find a deed which was lost: *Parkin v. Thorold*, 1852, 16 Beav. 59. A week's notice by the purchaser was insufficient where the vendor had to inquire very minutely into the circumstances of his birth in order to prove his legitimacy: *King v. Wilson*, 1843, 6 Beav. 124. A notice by the purchaser fixing fourteen days for the delivery of a supplemental abstract was considered long enough when the purchaser had for some weeks past requested the vendor to make the abstract complete: *Compton v. Bagley*, (1892) 1 Ch. 313.

Two months' notice by the purchaser was held unreasonable where the vendor was doing all in his power to remove defects in title which it required more than two months to remove : *Wells v. Maxwell*, 1863, 32 Beav. 408.

Where time was originally of the essence, but negotiations had continued beyond the time fixed for completion, ten days' notice by the vendor was held reasonable, as the title had been accepted and the draft conveyance approved, and all that remained for the purchaser to do was to pay the purchase money, the raising of which had been made difficult by a sub-purchaser registering as a *lis pendens* his action against the original purchaser : *Smith v. Butsford*, 1897, 76 L. T. 179.

In the case of property of such a nature that if a time had been fixed in the contract the Courts would hold time to be of the essence, the notice fixing a date for completion need not give the same length of time as in the case of other property. Thus, in *Macbryde v. Weekes*, 1856, 22 Beav. 533, a contract to grant a mining lease, one month's notice was held sufficient, though the defaulting party, the intending lessor, had not yet delivered the abstract or prepared the lease : see *Compton v. Bagley*, (1892) 1 Ch. 313, stated above.

The reasonableness of the notice is determined as at the date when the notice is given : *Crawford v. Toogood*, 1879, 13 Ch. D. 153. There the purchaser's solicitors had had the abstract more than three months before the vendor's notice, fixing five weeks for completion, was sent, but the notice was held to be too short. In *McMurray v. Spicer*, 1868, 5 Eq. 527, negotiations had lasted more than three years before the notice was sent, but the notice giving the vendor only five weeks to complete was held to be too short.

The reasonableness of the notice depends, however, to a certain extent on the conduct of the parties. If the defaulting party has consumed the time in attempting to perform the act, the non-performance whereof delays the sale, the time so consumed by him previously to the notice is taken into account in determining whether sufficient time has been given him to perform that act, or is treated as proving the uselessness of giving him further time. Thus, ten days' notice to the vendor to procure the

Conduct
of party
receiving
notice.

execution of the conveyance by the necessary parties, was held sufficient, the vendor having already delayed completion two months in a fruitless endeavour to effect this. See *Benson v. Lamb*, 1846, 9 Beav. 502, where, however, there was an express agreement that if the vendor should be unable to obtain the concurrence of the requisite parties, each party to the contract should be at liberty to rescind it at ten days' notice. A fortnight's notice to furnish a certain declaration which the vendor had positively refused to furnish was held sufficient: *Nott v. Riccard*, 1856, 22 Beav. 307. But if the vendor had not objected to furnish the declaration, but had requested more time, a fortnight's notice to complete would, it appears, have been too short.

The reasonableness of the notice depends, too, on the conduct of the party giving the notice. Thus, a notice by the vendor was considered unreasonable, partly because he had previously left unanswered an inquiry by the purchaser as to when the vendor was likely to complete: *Green v. Sevin*, 1879, 13 Ch. D. 589. So, too, a great delay by the vendor makes it unreasonable in him to give a short notice. Thus, where the vendor had delayed two years, and then required the purchaser to complete in three weeks, this notice was considered unreasonable: *Green v. Sevin*, *ubi sup.* A great delay by the vendor renders it justifiable for the purchaser to invest his purchase money in such a way as to make it less accessible than it ought to be and would be if such delay were not to take place: *Ibid.* Six weeks' notice by the vendor was held unreasonable, as the vendor had himself taken more than six weeks to deliver the abstract: *Pegg v. Wisden*, 1852, 16 Beav. at p. 244.

Conduct of person giving notice.

Where the vendor gives notice, he must see that there is nothing left to be done on his part—*e.g.* a supplemental abstract to be sent, questions as to the concurrence of mortgagees in the conveyance to be answered.

The right to insist on completion by a given date may, whether time was originally of the essence or made so by notice (*King v. Wilson*, 1843, 6 Beav. 124), be waived either by express agreement or by conduct.

Waiver of essentiality of time—

By express
agreement;

The right is waived *pro tanto* where a second date is fixed for completion. But the substituted time is of the essence, if time was originally essential. "A mere extension of time and nothing more is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time": Jessel, M. R., in *Barclay v. Messenger*, 1874, 43 L. J. Ch. at p. 455, disapproving of the opinion of Romilly, M. R., in *Parkin v. Thorold*, 1852, 16 Beav. 59.

By conduct.

If the time for completion is once allowed to pass, and the parties continue the negotiations, time is no longer of the essence (*Webb v. Hughes*, 1870, 10 Eq. 281), unless the negotiations are expressly "without prejudice" to the right to rescind: *Tilley v. Thomas*, 1867, 3 Ch. 61. Such a protest may give the negotiations the character of a treaty for the renewal of a rescinded contract rather than the continuation of an uninterrupted and subsisting contract. See *Southcomb v. Bishop of Exeter*, 1847, 6 Ha. at p. 219. If the purchaser informs the vendor, or the vendor's agent, that he cannot complete by the time fixed, and the vendor or his agent makes no objection, this amounts to waiver: *Carpenter v. Blandford*, 1828, 3 Man. & Ry. 93. The vendor waives his right to insist on time being essential if he, after the time fixed for completion, treats the contract as subsisting—*e.g.* by asserting a claim to rent under the agreement: *Hudson v. Bartram*, 1818, 3 Mad. 440. If the purchaser receives and retains, without any protest, an abstract which shows the title to be in such a state that the vendor will necessarily be unable to complete within the time fixed, the purchaser waives his right to insist on time being essential: *Hipwell v. Knight*, 1835, 1 Y. & C. Ex. at p. 419. If the purchaser "goes on contesting the title without a protest against the delay, then the waiver is clear": *Magennis v. Fallon*, 1829, 2 Mol. at p. 576. If the purchaser, after being informed that the vendor's title depends on the result of a pending Chancery suit, goes on with the purchase instead of calling for his deposit on the expiration of the time fixed for completion, this amounts to waiver: *Pincke v. Curteis*, 1793, 4 Br. C. C. at p. 331. Allowing the deposit to remain in the hands of the vendor is not

conduct amounting to waiver on the purchaser's part: *Southcomb v. Bishop of Exeter*, 1847, 6 Ha. at p. 224, referring to *Watson v. Reid*, 1830, 1 Russ. & My. 236. Similarly, the omission of the vendor to return the deposit to the purchaser would not seem to amount to a waiver on the vendor's part, so as to invalidate his notice making time of the essence. See Sug. 269, commenting on *Reynolds v. Nelson*, 1821, 6 Mad. 18.

Notwithstanding any previous waiver, time may, it is conceived, be made essential by notice fixing a future and reasonably long time for completion.

If time is not made of the essence by the contract, or by the nature of the property or circumstances, the Court will relieve against a failure to complete on the date fixed, if it can do justice between the parties: *Roberts v. Berry*, 1853, 3 D. M. & G. 284; *Seton v. Slade*, 1802, 7 Ves. 265. This, the old rule of the Courts of equity, is now the rule in all the Divisions of the High Court of Justice, by virtue of the Judicature Act, 1873, s. 25, sub-s. 7: *Howe v. Smith*, 1884, 27 Ch. D. at p. 103.

Time not
always
essential.

If the purchaser is not prepared with his purchase money on the day fixed, then in cases where time is not of the essence the vendor cannot rescind at once, but must allow the purchaser a reasonable time: *Howe v. Smith*, 1884, 27 Ch. D. 89. There the contract was entered into on the 24th March, and completion was fixed for 24th April, the vendor not to re-sell for six weeks after the 24th April, and on the 20th June the vendor, after pressing for completion, agreed to extend the time for completion for a month; it was held that the expiration of that month was the latest time at which the purchaser could compel the vendor to accept the purchase money and complete.

Purchaser's
default.

If the time fixed is essential, the default of the purchaser in paying the purchase money will entitle the vendor to rescind on the day fixed for completion.

Where the purchase money is to be paid by instalments, and time is made of the essence of the contract, every default by the purchaser in payment of an instalment gives the vendor a new right to rescind: *Hunter v. Daniel*, 1845, 4 Ha. 420. But if time is not of the essence, or made so by notice, the purchaser's default in payment of an instalment (even if persisted in for

two or three years) does not amount to repudiation of the contract : *Cornwall v. Henson*, (1900) 2 Ch. 298.

If the vendor also is in default, being unable or unwilling to convey on the day fixed for completion, or (where time is not of the essence) within reasonable time afterwards, he cannot recover damages from the purchaser for the purchaser's breach in refusing to complete. See, in cases where time is or, under the old law, was of the essence : *Noble v. Edwardes*, 1877, 5 Ch. D. 378. This is an illustration of the principle of the mutuality of contracts ; in the old common law action for damages it was necessary for the vendor to allege and prove that he was ready and willing to perform the contract on his part. Now that the common law rule that time is always of the essence has been altered by the Judicature Act, the decision in *Noble v. Edwardes* still holds good, with this modification—viz. that in cases where time is not of the essence the vendor is not to be considered in default merely because he is unable or unwilling to convey on the day fixed. See, further, *Ellis v. Rogers*, 1885, 29 Ch. D. at p. 668, and *Bellamy v. Debenham*, (1891) 1 Ch. 412.

The vendor cannot take advantage of a condition making time of the essence if he has himself been guilty of gross negligence or improper conduct. It is the duty of a person who has sold property under such a condition to do all he can to make out his title : *Hudson v. Temple*, 1860, 29 Beav. 536.

Vendor's
default.

Except where time is of the essence, or the vendor has no title at all, or admits that he cannot make a title, or absolutely declines to answer a requisition on which the purchaser is entitled to insist, the purchaser cannot as a matter of course rescind on finding that the vendor will not be able to complete on the day fixed. The vendor is allowed a reasonable time to complete, and may enforce specific performance, if at the hearing he is able to convey and has shown a good title : *Hoggart v. Scott*, 1830, 1 Russ. & My. 293, and *Wylson v. Dunn*, 1887, 34 Ch. D. 569.

If time is of the essence, and it is clear that the vendor will not be able to convey with a good title shown on the day fixed, the purchaser can rescind at once, without waiting for the date

fixed for completion: *Weston v. Savage*, 1879, 10 Ch. D. 736. But if the vendor's inability is not clear the purchaser must wait. Thus, on a sale of leaseholds assignable only with licence, assignments to be registered with the lessor, the vendor is not bound before the date fixed for completion (a) to procure from the lessor a licence to assign or (b) to register previous assignments: *Stowell v. Robinson*, 1837, 3 Bing. N. C. 928. *A fortiori* where time is not of the essence: *Ellis v. Rogers*, 1885, 29 Ch. D. 661. And on the sale of an equity of redemption conditional on the mortgagee continuing the loan to the purchaser, a refusal by the mortgagee to continue the loan does not justify the purchaser in repudiating the contract at once; the purchaser must wait till the time fixed for completion, unless there is a special reason for treating that refusal as final: *Smith v. Butler*, (1900) 1 Q. B. 694.

If time is of the essence and the vendor commits an act of bankruptcy the purchaser may rescind at once and recover the deposit: *Powell v. Marshall*, (1899) 1 Q. B. 710.

If it is quite clear that the vendor has no title at all to the property sold, or to a material portion of it, or that his only title is contingent on the volition of a third person, the purchaser may, whether time is essential or not, rescind at once, even before the time fixed for completion. "When a person sells property which he is neither able to convey himself, nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it': per Romilly, M. R., in *Forrer v. Nash*, 1865, 35 Beav. 171, cited with approval by Fry, J., in *Brewer v. Broadwood*, 1882, 22 Ch. D. 105 (where time was of the essence), also by Lopes, L. J., in *Bellamy v. Debenham*, (1891) 1 Ch. 412, and by Stirling, J., in *Cooke and Holland*, 1898, 78 L. T. 106 (in which latter two cases the question whether time was of the essence was not adverted to): see also *Lee v. Soames*, 1888, 59 L. T. 366, and *Weston v. Savage*, 1879, 10 Ch. D. 736. In *Bryant and Barningham*, 1890, 44 Ch. D. 218, Cotton, L. J., says: "I do not doubt that if a vendor is able to make a good title before the day fixed for completion of the contract, the contract can be enforced." But this must

Where vendor has no title at all.

mean where the vendor's title was defective only, and not where he had no title at all at the date of the contract.

The purchaser may by negotiating waive his right to rescind : *Salisbury v. Hatcher*, 1842, 2 Y. & C. C. C. 54. But the mere fact of the purchaser fixing a short day for completion does not give the vendor the right to complete after the date fixed by the purchaser : *Lee v. Soames*, 1888, 59 L. T. 366.

If before the purchaser attempts to rescind the vendor acquires a good title, the purchaser then loses his right to rescind : see *Wylson v. Dunn*, 1887, 34 Ch. D. 569. And the purchaser is not presumed to have rescinded if he has merely brought an action for and recovered his deposit : *Hoggart v. Scott*, 1830, 1 Russ. & My. 293 ; but such an action, since the Judicature Act, might perhaps be regarded as a rescission by the purchaser.

It has been suggested that if the vendor is able and willing to complete at or before the time fixed for completion, then the purchaser who had rescinded on finding the vendor had no title at all may be liable in damages for his repudiation of the contract, although he cannot be compelled to complete : per Lindley, L. J., *Bellamy v. Debenham*, (1891) 1 Ch. at p. 420. But there is no such liability on the purchaser's part if the vendor is unable or unwilling to complete on the day fixed for completion : *Ibid.*

It is not easy to define what is meant by the vendor having "no title at all." The question is considered above, p. 234.

Want of title to the minerals was considered in *Bellamy v. Debenham*, (1891) 1 Ch. 412, as a case of no title at all ; but a different view was taken in *Jackson v. Haden*, (1906) 1 Ch. 412, which was a case of the vendor exercising the power of rescission given to him by the conditions : see below, p. 359.

On a sale of leaseholds, the fact that the vendor cannot assign without licence is not such a defect in title as to justify the purchaser in rescinding at once : *Ellis v. Rogers*, 1885, 39 Ch. D. 661. And where the lessor is not entitled to refuse his licence in the case of a responsible assignee, the lessor's unreasonable refusal will not justify the purchaser in rescinding, or even prevent the vendor from getting specific performance : *White v. Hay*, 1895, 72 L. T. 281. See below, p. 398.

Where the vendor described the property as "in the occupation of C., at a rental of 42*l.*," the fact being that C. held adversely to the vendor, and an ejectment action would be necessary to enable the vendor to give the purchaser possession, the Court refused to give the vendor further time, and allowed the purchaser to rescind : *Lachlan v. Reynolds*, 1853, Kay, 52.

Where the vendor was a tenant for life selling under the Settled Land Act, 1882, and trustees of the settlement under the Act were not appointed until a month after the time fixed for completion, this was held to be a defect in conveyance, and not in title, and time not being of the essence the purchaser was held to be unable to rescind : *Hatten v. Russell*, 1888, 38 Ch. D. 334.

If the vendor on his inability to sell being pointed out offers to procure the concurrence of some other person whose concurrence will confer a good title, the purchaser can object to this course being adopted if the effect of it would be to substitute a new vendor ; the purchaser cannot be compelled to enter into a new contract. Thus, where trustees contracted to sell, and on the purchaser objecting that they had no power, offered to substitute the tenant for life (selling under the Settled Land Act, 1882) as vendor in their place, the purchaser was held entitled to rescind : *Bryant and Barningham*, 1890, 44 Ch. D. 218. So, too, where trustees contracted to sell, and after the purchaser had rescinded, and after the date fixed for completion, offered to procure the concurrence of the beneficiaries : *Head's Trustees and Macdonald*, 1890, 45 Ch. D. 310, where, however, Fry, L. J., said : " If the trustees had been able to show that the beneficiaries did in fact consent to join, and an opportunity had been given of investigating their title, and it had been shown that they would concur in a reasonable time, it is by no means clear to me that the vendors might not have enforced their contract."

In the case of a sale by a first mortgagee, under a power of sale which can only be exercised on notice, there is some doubt as to the position of the purchaser when no notice has been given, but the waiver or concurrence of the mortgagor and subsequent incumbrancers is offered by the vendor. In *Forster v.*

Hoggart, 1850, 15 Q. B. 155, it was held that this was a different title from that which had been offered by the conditions, and the purchaser recovered his deposit. But in *Thompson and Holt*, 1890, 44 Ch. D. 492, where the facts were similar, the purchaser was compelled to complete on the first mortgagees procuring at their own expense the concurrence of or confirmation by the second mortgagees and the trustee in bankruptcy of the mortgagor. *Forster v. Hoggart* was not cited in *Thompson and Holt*. Probably the two cases are to be reconciled by treating *Thompson and Holt* as a case where time was not of the essence: in *Forster v. Hoggart* time was of the essence according to common law principles (see above, p. 309), and the concurrence of the mortgagor's assigns was not obtained till a year after the sale.

The case of A. selling, and B, the owner afterwards, ratifying A.'s act (*Bolton Partners v. Lambert*, 1889, 41 Ch. D. 295) is to be distinguished from the cases of an attempt to substitute a new vendor. And in cases of ratification the sale must (in order to be capable of being ratified) have been made by A. purporting to act as agent; an unauthorised person contracting as principal cannot by ratification be converted into an agent: *Keighley v. Durant*, (1901) A. C. 240.

If the vendor admits that he cannot make a good title, or absolutely refuses to comply with the purchaser's just requisition, the purchaser may be justified in rescinding without waiting for the day fixed for completion: *Maconchy v. Clayton*, (1898) 1 Ir. 291.

(ii) PAYMENT OF PURCHASE MONEY

The agreement may be so worded as to make the payment of the purchase money independent of the delivery of the abstract, proof of title, and execution by the vendor of the conveyance. If so, the vendor may sue for the purchase money, although he has not completed the contract on his part: *Dicker v. Jackson*, 1848, 6 C. B. 103. There the agreement fixed a date for the payment of the purchase money, and stipulated that the vendor should within one month from the date of the contract, or from being required to do so, deliver an abstract and deduce his title,

and that at any time before the date fixed for the payment of the purchase money the vendor would, on being thereunto requested by the purchaser, execute a conveyance; it was held that the delivery of the abstract, deduction of title, and execution of the conveyance was not a condition precedent to the vendor's right to maintain an action for the non-payment of the purchase money.

So, too, an agreement by the purchaser to pay the purchase money on a fixed date followed by an agreement by the vendor to convey on payment of the purchase money, is independent of the agreement to convey, and may be sued on by the vendor notwithstanding he has not conveyed: *Yates v. Gardiner*, 1851, 20 L. J. Ex. 327.

But, as a general rule, the completion by the purchaser is dependent on the completion by the vendor, or rather the readiness and willingness of the vendor to complete. The usual condition, "the sale shall be completed and the remainder of the purchase money paid at," &c., would be construed as a mutual agreement for conveyance and payment at the same time and place, the payment being dependent on the execution of the conveyance.

An agreement to pay the purchase money "upon the vendor's making a good title or executing a bond to complete such title," does not mean that the purchase money is to be paid, even though the vendor cannot show a good title: *Clarke v. Faux*, 1827, 3 Russ. 320.

Where the payment of the purchase money and the execution of the conveyance are stipulations dependent on each other, it is not necessary for the vendor to execute a conveyance before suing for the purchase money; it is sufficient for him to show that he is and has always been ready and willing to execute a conveyance: *Poole v. Hill*, 1840, 6 M. & W. 835.

Where the condition provides that the purchase money shall be paid by instalments, and on default in payment the vendor to be at liberty to re-sell, the mere fact that the purchaser has made default (even for two or three years) in payment of an instalment, though it may entitle the vendor to re-sell, does not amount to repudiation of the contract: *Cornwall v. Henson*, (1900) 2 Ch. 298.

And a stipulation that on the non-payment of one instalment all the instalments previously paid shall be forfeited will be treated as a penalty and relieved against: *Dagenham (Thames) Dock Co.*, 1873, 8 Ch. 1022.

A condition that the purchaser shall pay the purchase money to the solicitor of the vendors is not, in case of a sale by the creditors' assignees of a bankrupt, under 1 & 2 Will. IV. c. 56, such a breach of trust as to induce the Court to refuse specific performance of the contract: *Hughes v. Morris*, 9 Ha. 636. A condition that the purchaser shall pay the purchase money to the vendors' solicitors is not an improper condition in the case of trustees, unless this is forbidden by the instrument creating the trust: see Trustee Act, 1893, s. 17.

The auctioneer has usually no authority to receive the balance of the purchase money: *Sykes v. Giles*, 1839, 5 M. & W. 645.

If, pursuant to express authority, the purchase money is paid into the vendor's bank in the joint names, the money is so paid at the vendor's risk: *St. Paul v. Birmingham &c. Ry. Co.*, 1853, 17 Jur. 1176.

(iii) INTEREST PAYABLE, IN WHAT CASES

No condition
as to interest.

In the absence of stipulation as to interest, or other express provision for compensating the vendor for delay, the purchaser, if in default, must pay interest on the purchase money: *Acland v. Gaisford*, 1816, 2 Mad. 28.

If some other provision is made for compensating the vendor for the purchaser's delay, then, in accordance with the maxim *Expressum facit cessare tacitum*, the vendor will not be entitled to interest. And if the conditions expressly provide for the payment of interest in one event, interest will not be payable in other events.

Thus no interest was payable where the agreement provided that the purchaser should have the rents and profits "from the 29th September, provided the purchase should be then completed, but, if the same should be settled either previously or subsequently to that period, then the purchaser should be entitled to such rents and profits from the time of such settlement"; *Brooke v. Champenowne*, 1837, 4 Cl. & F. at p. 611.

If the vendor is in default, he cannot claim interest, unless there is an express stipulation. If interest at 4l. per cent. exceeds the rents and profits, the Court will leave the defaulting vendor in possession of the interim rents and profits, instead of giving him interest on the purchase money. If interest at 4l. per cent. is the same as, or less than, the rents and profits, then, in the absence of agreement, the vendor receives interest from the day of completion, and the purchaser takes the rents and profits as from that date. See *Esdaile v. Stephenson*, 1822, 1 S. & St. 122.

An agreement to pay "expenses" is not an agreement to pay interest: *Sweetland v. Smith*, 1833, 1 Cr. & M. 585 (a case of agreement for a mortgage). Express stipulation.

If there is an express condition for payment of interest, interest will be payable even if it exceeds the rents and profits: *Tewart v. Lawson*, 1856, 3 Sm. & G. 307. And the purchaser cannot escape his liability to pay interest by appropriation.

Even though, owing to the state of the title, the purchaser may be justified in rescinding, yet, if he elect to complete, he will have to pay interest under the condition: *Williams v. Glenton*, 1866, 1 Ch. 200.

On a sale by the Court, the order directing the purchaser to pay interest, in accordance with the conditions, was made without prejudice to the purchaser's right to apply for compensation on the ground of expense caused by the state of the vendor's title: *Greenwood v. Churchill*, 1845, 8 Beav. 413.

The conditions may make interest payable (a) in the case of "the purchaser's default"; (b) if the delay arises "from any cause whatever"; (c) if it arises "from any cause other than the vendor's wilful default"; (d) if it arises "from any cause other than the vendor's default" (omitting the word "wilful"); or (e) may make interest payable *simpliciter*, without mentioning the cause of the delay; or (f) the condition as to interest may be otherwise worded. Form of condition.

(a) *Condition making interest payable if delay arises
"through purchaser's default"*

A condition making interest payable if the delay arises "through the purchaser's default," merely gives the vendor (a) "Purchaser's default."

the right which he would have had in the absence of stipulation.

In *Perry v. Smith*, 1842, 1 Car. & M. 554, there was a condition that, if completion was delayed "on the part of the purchaser" beyond the 27th June, the purchaser should pay interest. On the 27th June the vendor and his trustee were ready to complete, but the purchaser was not. On the 28th November, the purchaser was ready, but the vendor was in default, because his trustee would not join. The purchaser was only compelled to pay interest for the period during which he was in default—viz. from the 27th June to the 28th November.

The condition, "if, *from any cause whatever*, the purchase money shall not be paid (on the fixed date) the purchaser *making default* shall pay interest," is a condition under this head, and not under (b). Where such a condition was used, the purchaser was not compelled to pay interest when the delay was due to the state of the vendor's title: *Denning v. Henderson*, 1847, 1 De G. & Sm. 689 (a sale by the Court); *Jones v. Gardiner*, (1902) 1 Ch. 191.

(b) *Condition making interest payable if delay arises*
"from any cause whatever"

This form of the condition has been held to have the same effect as the condition limited to delay arising "from any cause whatever except the wilful default of the vendor." In *Palmerston v. Turner*, 1864, 33 Beav. 524, Romilly, M. R., says that the words "any cause whatsoever" are to be read "any cause whatsoever other than the wilful default of the vendor." It would probably be more correct to say that the vendor will not be allowed to enforce the condition if the delay has been caused by his wilful default. The principle, whether it is stated as a rule of construction or as a rule of law overruling the contract, was well settled: see *Williams v. Glenton*, 1866, 1 Ch. at p. 210. But some doubt has been thrown on it by the Court of Appeal in *Hedling and Merton*, (1893) 3 Ch. at p. 281. And it must be remembered that the present tendency of the Courts is to construe contracts literally and to give effect to them notwithstanding their unreasonableness.

(b) "Any cause whatever."

Under condition (b) the purchaser has had to pay interest—where the delay was caused by the purchaser taking an untenable objection (*Storry v. Walsh*, 1854, 18 Beav. 559), or by an act of God—viz. the vendor's death (*Bannerman v. Clarke*, 1856, 3 Drew. 632), or by the necessity of instituting a suit for the rectification of the power under which the vendor was selling (*Palmerston v. Turner*, 1864, 33 Beav. 524); also where the vendor had to institute a partition action (*Williams v. Glenton*, 1866, 1 Ch. 200), and in other cases where the delay was caused by the state of the vendor's title : *Vickers v. Hand*, 1859, 26 Beav. 630; *Sherwin v. Shakspear*, 1854, 5 D. M. & G. 517; *Tewart v. Lawson*, 1856, 3 Sm. & G. 307. Also where the delay was caused by the vendor unsuccessfully resisting, on the ground of mistake, the purchaser's action for specific performance : *North v. Percival*, (1898) 2 Ch. 128.

In *De Visme v. De Visme*, 1849, 1 Mac. & G. 336, where the vendor's default in delivering the abstract had caused the delay, the purchaser was held liable to pay interest only from the time a good title was shown. The vendor there had bound himself to deliver the abstract within a certain time, and had failed to do so. The delay, therefore, arose from the non-performance of an act which the vendor had stipulated to perform. It was considered (*ibid.* p. 351) that the words “from any cause whatever”—could not include the failure by the vendor to perform an express stipulation, because the parties did not contemplate a breach of the contract by either of them.

De Visme v. De Visme was considered as deciding that, notwithstanding the condition “from any cause whatever,” the purchaser is only liable to pay interest from the time a good title is shown. This is the view taken and followed in *Robertson v. Skelton*, 1850, 12 Beav. 363. If so, *De Visme v. De Visme* conflicts with the cases above mentioned, and, as Lord Langdale, M. R., said, in *Rowley v. Adams*, 1850, 12 Beav. 476, “it is necessary that that case” (*De Visme v. De Visme*) “should be acted on with some caution.” This caution may perhaps be shown by limiting the decision in *De Visme v. De Visme* to the case of the vendor's default in delivering an abstract where the contract fixes a date for such delivery. The purchaser would

then be allowed the same period after the delivery of the perfect abstract as is given by the conditions, and would only have to pay interest from a period after the delivery of the perfect abstract, corresponding to the period allowed by the contract to elapse between the delivery of the abstract and the day from which interest was to run. This, or something like this (the facts being complicated by a substituted agreement), was the course adopted in *Sherwin v. Shakspear*, 1854, 5 D. M. & G. 517. In *Vickers v. Hand*, 1859, 26 Beav. 630, Romilly, M. R., held that *De Visme v. De Visme* had been overruled by *Sherwin v. Shakspear*.

(c) *Condition making interest payable, if completion is delayed "from any cause whatever, except the wilful default of the vendor"*

(c) "Any cause except vendor's wilful default."

The word "default" in condition (c) means merely not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction: *Young and Harston*, 1885, 31 Ch. D. at p. 174 (per Bowen, L. J.). The word "wilful" in such a condition implies an action of the vendor's will. Nothing blamable is denoted; "it amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent": per Bowen, L. J., *ibid.* p. 175. Moral delinquency, intentional delay, and wilful obstruction may all be absent, and there may yet be wilful default: *Helling and Merton*, (1893) 3 Ch. 269. But there must, it would seem, be some intentional act or omission on the vendor's part.

Honest mistake.

On the other hand, it has been said that an honest mistake or oversight is not wilful default: *Mayor of London and Tubbs*, (1894) 2 Ch. 524 (Court of Appeal; Kay, L. J., dissenting). But an honest mistake, if persisted in, may amount to wilful default: *Bennett v. Stone*, (1903) 1 Ch. 509. A consideration of what happened in that case shows what difficulty the Court sometimes finds in deciding—first, whether the vendor's default has been wilful, and, secondly, whether his default was the cause of the delay. The conduct of the vendor complained of there was his altering the draft conveyance and threatening to cancel the

contract if the purchaser did not accept the alteration. Vaughan Williams, L. J., considered that the alteration of the draft conveyance, coupled with the threat to cancel the contract, amounted to wilful default; Stirling, L. J., that the alteration of the draft conveyance being done deliberately and persisted in amounted to wilful default; and Cozens-Hardy, L. J., that the vendor's conduct was honest, though mistaken, and therefore did not amount to wilful default. Vaughan Williams, L. J., held that the vendor's wilful default had caused the delay; Stirling, L. J., that though there had been wilful default it had not caused the delay; and Cozens-Hardy, L. J., that there was no wilful default.

Delay caused by the vendor's refusal to deliver an abstract under the honest mistake that the conditions precluded the purchaser from requiring an abstract, was held to be "wilful neglect or default": *Pelly and Jacob*, 1899, 80 L. T. 45 (but *qu.*? see *Mayor of London and Tubbs*, (1894) 2 Ch. 524.)

If a vendor enters into a contract knowing that there are difficulties which he may not be able to overcome by the time fixed for completion, then if, owing to such difficulties, completion is delayed, this is wilful default: *Helling and Merton*, (1893) 3 Ch. 269; *Trafford and Maples*, (1896) 1 Ch. 235.

Difficulty known to vendor.

Where part of the property was copyhold and the vendors did not take any steps to procure their admittance until after the day fixed for completion, this was held to be "wilful default." *Wilsons and Stevens*, (1894) 3 Ch. 546. And delay caused by negotiations between the vendors and the steward as to the remission of fees, was held to be part of the delay caused by the vendor's wilful default, and the purchaser was allowed a further period of three days after the vendor's actual admittance, and interest did not begin to run till the expiration of that period: *Ibid.*

Admittance to copyholds.

Where two days before the time fixed for completion the vendor left England without having executed the conveyance, which was ready for his execution on the afternoon of the day fixed, the vendor was held to have committed a wilful default: *Young and Harston*, 1885, 31 Ch. D. 168. There the conveyance had also to be executed by two mortgagees, who were out of

Leaving England.

town in different places. The vendor's solicitors declined to send the conveyance to them by special messenger, except at the purchaser's expense. Fry, L. J., considered that this was also a wilful default on the vendor's part. But the Court, including Fry, L. J., held that the purchaser was only entitled to be absolved from paying interest during the delay occasioned by the vendor himself being away from England, and that a reasonable time (a fortnight) must be allowed for the mortgagees' execution, during which time the purchaser must pay interest : *Ibid.*

Where the vendor's solicitors knew that the concurrence of one of two mortgagee-trustees would be difficult to obtain, as he was residing abroad, but they relied on an insufficient power of attorney given by him before he left the country, this was held to be wilful default : *Helling and Merton*, (1893) 3 Ch. 269.

Careless
examination
of title.

Carelessness in stating the vendor's title in the conditions is not wilful default : *Mayor of London and Tubbs*, (1894) 2 Ch. 524. In that case the property sold had for many years been held as one property called Farringdon Market, but the statutory title offered by the vendors did not cover the whole of the property, an important part being held under another title ; the Court of Appeal held (Kay, L. J., dissenting) that though the delay might have been caused by the omission of the vendors to verify the statement as to their title, this omission was not, under the circumstances, a wilful default.

Delay caused by the vendor insisting on inserting words in the conveyance which he is not entitled to insert is under some circumstances wilful default : *Bennett v. Stone*, (1903) 1 Ch. 509. (See above, p. 320.)

Purchaser
really causing
the delay.

If the purchaser's inability to procure the purchase money has been the real cause of the delay, the fact that there has also been wilful default on the vendor's part will not absolve the purchaser from his liability to pay interest : *Mayor of London and Tubbs*, (1894) 2 Ch. 524 ; *Bennett v. Stone*, (1903) 1 Ch. at pp. 523, 527.

- (d) *Condition making interest payable if completion is delayed*
 “from any cause whatever other than the vendor’s default”

The words “from any cause whatever other than the vendor’s default” entitle the vendor to interest if the delay is caused by a defect in the title of which the vendor was ignorant, and which was not so obvious as to make his ignorance inexcusable or unreasonable : *Woods and Lewis*, (1898) 1 Ch. 433 ; 2 Ch. 211.

(e) *No mention of cause of delay*

A condition “if the conveyance be not executed by the necessary parties, and the purchase money paid on or before (a given day), the purchaser shall pay interest at 5*l.* per cent.” *simpliciter*, and omitting the words “from any cause whatever” has the same effect as condition (b), and will bind the purchaser to pay interest, even if the vendor has, by the state of his title, caused (but not wilfully caused) the delay : per Leach, V.-C., in *Esdaile v. Stephenson*, 1822, 1 S. & St. 122.

(c) Cause of delay not specified.

(f) *Other forms of the condition*

A stipulation that interest at 5*l.* per cent. shall be paid if the delay arises “by reason of any unforeseen or unavoidable obstacle,” does not entitle the vendor to interest if the delay is caused by the state of the vendor’s title : *Monk v. Huskisson*, 1827, 4 Russ. 121 *n.*, where Leach, M. R., thought the only effect of such a condition was to show the rate of interest, not to make interest payable which would not otherwise have been payable. This case would probably not be followed now, and interest would be given under such a condition, unless it could be shown that the vendor knew of the defect in his title, so that it was not an “unforeseen” obstacle.

(f) Other forms.

A stipulation that interest should be paid in case of delay caused “by any unavoidable obstacle” was also held not to entitle the vendor to interest where the delay is caused by the state of his title : *Birch v. Podmore*, Sug. 635 (but *qu. ?*).

The condition “under no circumstances shall the purchaser be excused from paying interest from that day until payment of the purchase money,” receives the same construction as the

condition "from any cause whatever" : *Rowley v. Adams*, 1850, 12 Beav. 476.

Procedure.

The Court has jurisdiction, upon a summons under the Vendor and Purchaser Act, 1874, to make a declaration that interest is payable, and as to the rate of interest payable, by the purchaser on the balance of the purchase money : *Monckton and Gilzean*, 1884, 27 Ch. D. 564 ; *Riley to Streatfield*, 1886, 34 Ch. D. 386.

But interest erroneously paid by the purchaser cannot be recovered by summons under the Vendor and Purchaser Act ; an action should be brought to recover it : *Young and Harston*, 1885, 29 Ch. 691. On appeal, the vendor waived the objection as to jurisdiction : 31 Ch. D. 168.

(iv) TIME FROM WHICH INTEREST IS PAYABLE

In the absence of stipulation interest is payable from the time fixed by the conditions for completion—*i.e.* as against the purchaser, the time fixed for payment of the purchase money : *Acland v. Gaisford*, 1816, 2 Mad. 28.

If a time is fixed for completion, and a time is also fixed for the delivery of the abstract, then, if the vendor is in default in delivering his abstract, interest does not begin to run until a period has elapsed from the delivery of the perfect abstract corresponding to the period between the two dates mentioned in the contract : *Sherwin v. Shakspear*, 1854, 5 D. M. & G. 517. Even if it is only a small part for which a perfect abstract is not sent, time runs, as to the whole property, from the delivery of the perfect abstract to that part : *Ibid.* at p. 530. As to the meaning of "perfect abstract," see above, p. 264.

If a perfect abstract is delivered interest is payable from the time fixed for payment of interest, notwithstanding that the vendor, in answer to requisitions, furnishes a further unnecessary title : *Litchfield v. Brown*, 1853, 23 L. J. Ch. 176.

A contract to sell "subject to the same terms as to title &c. as the vendor purchased" does not import the time fixed for completion in the original contract, but interest will run as in the case of an open contract (see below) : *Keeble and Stillwell*, 1898, 78 L. T. 383.

On an open contract (*i.e.* a contract which fixes no date for completion) or on a contract which makes the payment of the purchase money dependent on the execution by the vendor of the conveyance and the giving of possession with a good title, interest will be payable from the time when the vendor showed a good title, and was ready and willing to give possession and execute a conveyance (*Jones v. Mudd*, 1827, 4 Russ. 118), or (to use Lord Romilly's phrase in *Carrodus v. Sharp*, 1855, 20 Beav. 56) the time when the purchaser could "prudently take possession," or "from the time at which the purchaser might prudently have taken possession supposing it to have been offered him—that is, the time when a good title is shown": *Pigott and G. W. R.*, 1881, 18 Ch. D. 146 (case of a compulsory purchase by a railway company).

The rule as above stated does not distinguish between "showing" a good title, and "making" a good title. A good title is "shown" when all the documents and facts essential to the title are stated in the abstract. A good title is not made until the abstract is verified: *Parr v. Lovegrove*, 1857, 4 Drew. at p. 181. The cases do not draw this distinction, but say simply interest was payable from the time a good title was "shown." See *Pigott and G. W. R.*, 18 Ch. D. at p. 150, and *Monk v. Huskisson*, 1827, 4 Russ. at p. 123. In *Jones v. Mudd*, 1827, 4 Russ. 118, the Master certified that a good title could be "made" to the estate, and was first "shown" on the 15th of January, 1827, and the Vice-Chancellor, the appeal from whom was dismissed, directed interest to be paid from the 15th of January, 1827. Probably, however, if, soon after receiving the abstract, the purchaser asked for evidence of a certain fact essential to the title, and stated on the abstract, and the delay of the vendor in producing this evidence caused the purchaser to abstain from taking possession, interest would begin to run from the time when the vendor produced the evidence—*i.e.* "made" a good title—and not from the time when he delivered the abstract—*i.e.* "showed" a good title.

It is to be observed that if the delay of the vendor to verify any part of his title is caused by the purchaser refusing to complete on another ground, which is afterwards held to be

Purchaser
causing
vendor's
delay

untenable, interest is payable by the purchaser from the time fixed for completion, and not from the time when the vendor verified his title, since such verification in respect of a matter not in dispute was unnecessary until the matters in dispute were settled : *Monro v. Taylor*, 1852, 3 Mac. & G. at p. 724.

Purchaser in possession.

If the purchaser is in possession at the date of the contract, or takes possession before the vendor has shown a good title or executed the conveyance, interest will be payable from the time fixed for payment of the purchase money, notwithstanding that the payment of the purchase money was made dependent on the performance by the vendor of those acts : *Att.-Gen. v. Christ Church*, 1842, 13 Sim. 214. And if no time is fixed for the payment of the purchase money, interest will be payable from the time at which the purchaser took possession, or, if the purchaser was already in possession at the date of the contract, from the date of the contract : see *Birch v. Joy*, 1851, 3 H. L. C. 565 ; *Fletcher v. Lanc. & Y. Ry.*, (1902) 1 Ch. at p. 908.

On a purchase by a railway company under its compulsory powers, if possession is taken before the price is fixed, interest is payable from the time of taking possession : *Rhys v. Dare Valley Ry. Co.*, 1874, 19 Eq. 93. But it would seem that the sum payable in respect of the period between taking possession and fixing the price is payable rather as damages than as interest : see *Marsh v. Jones*, 1889, 40 Ch. D. 563.

The fact that the purchaser, who takes possession, receives no rent and makes no profits, does not affect his liability to pay interest : *Ballard v. Shutt*, 1880, 15 Ch. D. 122. There waste land was sold, and the purchaser put up a notice-board on the land, announcing it to be let or sold for building purposes, but he received no rent or profit from the land.

Subsequent abandonment of possession by a purchaser who has once taken possession is unavailing ; his liability to pay interest continues : *Binks v. Rokeby*, 1818, 2 Swanst. at p. 226.

Reversion.

On the sale of a reversion, interest is payable from the day fixed for completion, whether the vendor has shown a good title or not. " Upon the sale of a reversion, the time at which the purchaser takes possession has nothing to do with the question of interest on the purchase-money. The advantage obtained

by the delay and wearing out of the prior life interest is equivalent to the receipt of the rents of a property in possession": *Bailey v. Collett*, 1854, 18 Beav. at p. 182; *Ex parte Manning*, 1727, 2 P. W. 410.

If no time is fixed for completion, the purchaser of a reversion has (like the purchaser of property in possession, see p. 325) to pay interest from the time when the vendor shows a good title: *Enraght v. Fitzgerald*, 1842, 2 Dr. & War. 43.

Even in the case of a reversion, if the conditions show that the purchaser is not to receive the rents until the actual completion of the sale, no interest is payable to the vendor: *Brooke v. Champenowne*, 1837, 4 Cl. & F. 589.

An express agreement that "the interest of the remainder of the purchase money shall not commence till Lady Day next, in case the title shall be perfected, and the conveyances and other assurances of the different estates are executed by that time, and, if not, then the interest to commence upon the execution of such assurances," will not entitle the purchaser to refuse to pay interest if he has had possession for many years: *Birch v. Joy*, 1851, 3 H. L. C. 565. Such an agreement is not meant to continue in operation for a long period after the day fixed therein: *Ibid.* p. 597.

Interest from execution of conveyance.

Interest on the sum to be paid for the timber does not begin to run until the sum is ascertained, since the increase in value of the timber between the date of the contract and that of the valuation is regarded as equivalent to interest on the purchase money: *Sug.* 631.

Timber.

(v) ON WHAT INTEREST IS PAYABLE

In the absence of stipulation, interest is not payable by the purchaser on the amount of the deposit, although, owing to the purchaser's default, the deposit has been retained by the auctioneer: *Bridges v. Robinson*, 1811, 3 Mer. 694.

But where the purchaser was to pay into the hands of the auctioneer a deposit of 20*l.* per cent. in part of the purchase money, and in case of delay the vendor was to have interest at 5*l.* per cent. on the purchase money, and the auction duty was to

be borne equally by the purchaser and the vendor, the purchaser, who had paid the deposit, but not his moiety of the auction duty, was held bound to pay interest on so much of the deposit as had been applied by the auctioneer in payment of the purchaser's moiety of the auction duty : *Townshend v. Townshend*, 1826, 2 Russ. 303.

Interest is payable on part of the purchase money remaining in the hands of the purchaser for the purpose of paying off incumbrances : *Hughes v. Kearney*, 1803, 1 Sch. & Lef. at p. 134.

(vi) THE RATE OF INTEREST

In the absence of stipulation, the rate of interest is 4*l.* per cent. per annum : *Acland v. Gaisford*, 1816, 2 Mad. 28. But in *Burnell v. Brown*, 1867, 1 Jac. & W. 168, interest was allowed at the rate of 5*l.* per cent., on the ground that the vendor might have made as much as 5*l.* per cent. if the purchaser had paid the purchase money.

Where it had been agreed that the purchase money should be paid by six instalments with interest at 5 per cent., and it was subsequently agreed that the last instalment should remain on mortgage at 4½ per cent. for fourteen years, but that the stipulations of the first contract as to the previous instalments should remain in force, the Court held that, the earlier instalments being in arrear and no mortgage executed, the vendor was entitled to interest at 5 per cent. on the last instalment as well as on the others : *Attwood v. Taylor*, 1840, 1 Man. & Gr. 279.

The conditions may reserve interest on an ascending scale : *Herbert v. Salisbury and Yeovil, &c.*, 1866, 2 Eq. 221, where Lord Romilly, M. R., refused to treat the increase of interest as a penalty as in the case of a mortgage.

In the absence of stipulation, if a mortgagee purchases the equity of redemption and takes possession before completion, the Court will set off the interest payable to him on the mortgage against the interest payable by him on a corresponding portion of the purchase money, even though interest is payable on the mortgage at a higher rate : *Wallis v. Bastard*, 1853, 4 D. M. & G. 251.

In one case, the conditions of sale provided that the purchaser should pay interest on the remainder of his purchase money at 5*l.* per cent. By a subsequent agreement, further time was given to the vendor to complete, and it was arranged that the remainder of the purchase money should be paid at such further time and without interest, and that if the vendor failed to make a good title he should return the deposit, with interest at 4*l.* per cent. The purchaser afterwards failed to complete, and was held liable to pay interest on the remainder of the purchase money at 4*l.* per cent. : *Minchin v. Nance*, 1841, 4 Beav. 332 ; *Birch v. Joy*, 1851, 3 H. L. C. 597.

If the vendor refuses to give possession and allows the property to deteriorate, the purchaser will be entitled to set off the amount of the deterioration, as well as the rents received, or which might have been received, against the interest which he has to pay : *Phillips v. Silvester*, 1872, 8 Ch. 173.

(vii) APPROPRIATION

In the absence of a stipulation that the purchaser shall pay interest if completion is delayed "from any cause whatever," or "from any cause other than the vendor's wilful default," the purchaser may, if completion is delayed on the vendor's part, escape his liability to pay the full amount of interest by appropriating a sum of money for the payment of the purchase money, and giving the vendor notice of such appropriation. The vendor will, in that case, be entitled only to the interest actually made, and the purchaser will be entitled to the rents and profits.

It is not well settled what acts amount to appropriation.

Merely giving notice that the purchaser will not pay interest is not enough : *Williams v. Glenton*, 1866, 1 Ch. 200, where the purchaser actually employed the purchase money in his trade. Notice.

Keeping the money lying idle, and giving the vendor notice, was considered enough in *Dyson v. Hornby*, 1851, 4 De G. & Sm. 481, and in *Regent's Canal Co. v. Ware*, 1857, 23 Beav. 575 (but this was a compulsory purchase). There is a *dictum* of Lord Cottenham to the same effect in *De Vismé v. De Vismé*, 1849,

1 Mac. & G. at p. 352. See, however, *Acland v. Gaisford*, 1816, 2 Mad. 28, for a contrary view. In *Winter v. Blades*, 1825, 2 S. & St. 393, payment into the purchaser's general account at his bankers, and giving the vendor notice that the purchaser was ready to invest the purchase money as he should direct, was held to be an insufficient appropriation, as the purchaser allowed this money to take the place of the balance which he would otherwise have maintained at his bankers. However, the purchaser was excused from paying interest on the amount of the purchase money, from which he was supposed to have gained no advantage. To ascertain this amount, the purchaser's average balance for three years prior to the purchase was deducted from his average balance during the period of appropriation, and to the amount of that difference the purchaser was not chargeable with interest.

Investing or
depositing.

But now, probably, it would be held that the purchaser must either invest the purchase money, or place it on deposit at a bank to a separate account. See *Williams v. Glenton*, 1866, 1 Ch. at p. 206. The fact that the bank does not allow interest will not vitiate the appropriation: *Golds and Norton*, 1885, 52 L. T. 321.

Where the purchasers (a railway company) agreed that the purchase money, which had been deposited in a bank, should remain there "until the completion of the purchase, when the same should be paid over to the parties entitled, or be paid into Court, and that the company should pay interest up to and inclusive of the day on which the said purchase shall be completed," and, the vendor not being ready, paid the purchase money into Court, this was held to be completion on their part, so as to absolve them from payment of interest subsequent to the payment into Court: *Lewis v. South Wales Ry. Co.*, 1852, 10 Ha. 113.

But payment into Court, unless expressly authorised by the conditions or subsequent agreement, will not enable the purchaser to escape liability for interest: *Bannerman v. Clarke*, 1856, 3 Drew. 632.

In *Kershaw v. Kershaw*, 1869, 9 Eq. 56, the contract was "the amount of purchase money, 38,500*l.*; purchase to take

effect from 30th June, and interest at 5*l.* per cent. to time of payment, and timely notice to be given as to requirement of purchase money." The purchaser paid 38,000*l.* to a separate account at a bank, and gave notice to the vendor. The vendor replied disputing the sufficiency of the notice, but not pointing out that the sum was 500*l.* too little. The purchaser afterwards discovered the deficiency, and thereupon paid in 500*l.*, with interest. It was held that the purchaser was not liable to pay interest subsequently to the time when he paid in the 38,000*l.*, other than the interest allowed by the bank.

Appropriating the money without giving notice to the vendor that the money is lying idle does not free the purchaser from his liability to pay interest : *Powell v. Martyn*, 1803, 8 Ves. 146.

If there is an express stipulation that interest is to be paid in case of delay "from any cause whatever," or "from any cause other than the vendor's wilful default," then it would seem (but the authorities are conflicting) that no appropriation will enable the purchaser to escape his liability, unless the delay is caused by the vendor's wilful default.

Effect of condition "any cause, &c." on purchaser's appropriation.

This was laid down in *Riley to Streatfield*, 1886, 34 Ch. D. 386 (North, J.), following *Vickers v. Hand*, 1859, 26 Beav. 630; see, too, *Bannerman v. Clarke*, 1856, 3 Drew. 632. The contrary view is supported by *Golds and Norton*, 1885, 52 L. T. 321 (Kay, J.), and by a *dictum* of Lord Cottenham's in *De Visme v. De Visme*, 1849, 1 Mac. & G. at p. 352, and by some remarks of Knight-Bruce, L. J., in *Williams v. Glenton*, 1866, 1 Ch. at p. 206. The discrepancy is probably due to the fact that the distinction between the cases in which there was the stipulation above mentioned, and those in which there was no express stipulation about interest, or interest was only payable in case of the purchaser's default, was not adverted to in the last three cases.

If the delay is due to the vendor's wilful default, as where the vendor repudiates the contract, the purchaser may appropriate the purchase money, so as to escape liability to pay interest : *Kershaw v. Kershaw*, 1869, 9 Eq. 56. And that, too, notwithstanding that, by the conditions, interest is payable if "from any cause whatever" the purchase is not completed on the day fixed : *Monckton and Gilzean*, 1884, 27 Ch. D. 555.

Vendor's wilful default.

Unnecessary
appropriation.

If the purchaser has unnecessarily appropriated the purchase money in order to escape the payment of interest, which was not really payable, the Court will not make the vendor pay him compensation for the loss of interest owing to such appropriation : *De Visme v. De Visme*, 1849, 1 Mac. & G. 336. In that case, the state of the vendor's title delayed the completion beyond the fixed day. The purchaser placed the purchase money to a separate account on deposit at 2½ per cent., and gave notice to the vendor. The Court held (see above, p. 319, as to the correctness of this decision) that the time when the vendor could show a good title was the time for completion, and that, till then, the vendor was entitled to the rents, and the purchaser did not become liable for interest till after that time. The purchaser claimed compensation for the loss of interest occasioned by the appropriation of the purchase money. The claim was disallowed, on the ground that the appropriation was unnecessary, and that the loss thereby occasioned was not one arising from the contract.

Purchaser in
default.

It appears to be only in the case of the vendor's default that the purchaser can escape the liability to pay interest by appropriating the purchase money ; if the vendor has made out a good title, and is ready and willing to complete, or if the purchaser takes and insists on an objection which is untenable, the purchaser will have to pay interest, even if he have deposited the purchase money at a bank. The case of *Calcraft v. Roebuck*, 1790, 1 Ves. jun. 221, is not a sufficient authority for this proposition, because the appropriation there was insufficient, inasmuch as the purchaser gave no notice to the vendor : *Ibid.* p. 225. In *Humphries v. Horne*, 1844, 3 Ha. 276, where the purchaser paid part of the purchase money, and obtained an injunction to restrain the vendor from suing him for the balance, on the terms of the purchaser paying such balance into Court, the purchaser, who was afterwards held to have been in the wrong, was ordered to pay interest on the balance, although no interest had accrued on the money in Court.

Appropriation making
more interest.

If the vendor does not assent to the appropriation, and the appropriated and invested purchase money makes more than the interest payable by the purchaser, the purchaser is not bound to

pay the whole of the interest, but only to pay interest at the rate which he would have had to pay if he had not invested the purchase money—*i.e.* in the absence of stipulation, interest at the rate of 4l. per cent. : *Acland v. Gaisford*, 1816, 2 Mad. 28.

If the money is invested with the vendor's consent in the joint names of the vendor and purchaser, the vendor is entitled to any gain, and must bear any loss caused by such investment : *Burroughes v. Browne*, 1852, 9 Ha. 609. Joint investment.

The purchaser waives his right to escape the payment of interest by appropriation, if, after becoming aware of the fact that the state of the vendor's title must cause long delay in completion, he takes possession and agrees to pay interest : *Dickinson v. Heron*, Sug. 630 n. But if the delay be much greater than the purchaser could reasonably have apprehended, the waiver would probably not be held to be complete. Waiver of right to appropriate.

(viii) INCOME TAX

A purchaser paying interest on the purchase money is entitled under the Income Tax Act, 1853, s. 40, to deduct income tax : *Crane v. Kilpin*, 1868, 6 Eq. 334 (the case of an assignment to trustees for creditors of a fund in Court).

But on a sale by the Court, the purchaser is not, in the absence of stipulation, allowed to deduct the income tax on paying the purchase money into Court, but may, on payment out, apply to have the income tax which he has paid repaid to him out of the purchase money : *Bebb v. Bunny*, 1854, 1 K. & J. 216. These cases are not overruled by *Goslings v. Blake*, 1889, 23 Q. B. D. 324 (a decision with reference to short loans to bankers). Lindley, L. J., says there, at p. 330 : " We have nothing to do with the practice between vendors and purchasers. The practice, as I understand it, is, that if the purchaser has to pay the principal and interest into Court, he must pay it in full ; and if the purchaser has to pay the vendor, the purchaser deducts income tax."

(ix) POSSESSION

In the absence of stipulation the purchaser is not entitled to possession until he has paid his purchase money ; and if he

enters before, he is a trespasser: *Acland v. Gaisford*, 1816, 2 Mad. 28, citing *Crockford v. Alexander*, 1808, 15 Ves. 138.

Payment into Court.

Payment of the purchase money into Court is not sufficient to entitle the purchaser to possession: *Bygrave v. Metropolitan Board of Works*, 1886, 32 Ch. D. 147.

Instalments.

Where the purchase money is payable by instalments, and no date is fixed for possession, the purchaser would seem to be entitled to possession only upon the payment of the last instalment: see *Kenney v. Wexham*, 1822, 6 Mad. 355 (a sale of a life annuity).

Vacant possession.

In a condition of sale "possession" means, primarily, vacant possession. But the particulars or conditions may show that vacant possession is not meant. Thus, where an orchard was sold as "in the occupation of X.," the "possession" promised to the purchaser was held to mean not vacant possession, but possession subject to and with the benefit of X.'s tenancy: *Lake v. Dean*, 1860, 28 Beav. 607.

"Quarter-day before day of payment."

In a condition binding the purchaser to pay the purchase money in May, and if completion is delayed to pay interest until completion, the words "and he is to be let into possession from the quarter-day next preceding the day of payment," were construed as giving the purchaser the right to the rents from the quarter-day before the day fixed for payment—*i.e.* the 25th of March—not the quarter-day next before the day of actual payment, which was in December: *Nicholson v. Nicholson*, 1835, 5 L. J. Ch. 51.

Possession with good title.

Where it is agreed simply that "possession" shall be given on a fixed day, this means possession which cannot be disturbed, possession with a complete title previously shown, though not necessarily with a conveyance to the purchaser previously executed: per Rolt, L. J., in *Tilley v. Thomas*, 1867, 3 Ch. 61. But where one day is fixed for giving "possession," and another subsequent day for "completion," possession there means possession irrespective of title: per Lord Cairns, *ibid.*

Damages for loss of possession.

If the vendor, through the state of his title, is unable to give possession to the purchaser upon the day fixed for giving possession, or, if no day is so fixed, upon the day fixed for completion, the purchaser will be entitled to the rents and profits

subsequently received by the vendor, but not to damages. If the vendor wilfully refuses to complete, the purchaser may, in addition to obtaining specific performance of the contract for sale, recover damages for the breach of the vendor's express or implied contract to give possession at a certain date. Such damages will be in the nature of damages for a loss *pro tanto* of the bargain.

This rule seems a necessary deduction from the rule of *Bain v. Fothergill*, 1874, L. R. 7 H. L. 158; see above, p. 130. However, in *Royal Bristol, &c. v. Bomash*, 1887, 35 Ch. D. 390, where a house was sold as "recently in the occupation of F.," the vendor expecting that F. would be willing to quit before the day fixed for completion, but F.'s occupation did not cease at the time fixed by the conditions for completion and giving of possession; the purchaser was held entitled to compensation for the loss of a tenant during the period elapsing from the time fixed for completion. The correctness of this decision is open to doubt, as there was no fraud or wilful default on the vendor's part: *Ibid.* p. 396. The case was put as one of guarantee: *Ibid.* p. 394 (but *qu.?*). The case of *Jaques v. Millar*, 1877, 6 Ch. D. 153 (see below), relied on in *Royal Bristol, &c. v. Bomash*, was a case of wilful default.

In the case of *Rowe v. London School Board*, 1887, 36 Ch. D. 619, Kekewich, J., held that he could not award damages for delay (not wilfully caused) in completing a contract to grant a right of way and make a road, as that contract was governed by the same principles as a contract to sell land; but his Lordship's previous decision in *Royal Bristol, &c. v. Bomash, ubi sup.*, was apparently not called to his attention. In the latter case the damages were styled "damages by way of compensation," but in *Wilsons and Stevens*, (1894) 3 Ch. at p. 552, North, J., said the claim in question is not a claim for compensation but for unliquidated damages for non-delivery of possession according to the contract. Damages for delay ought not to be granted on vendor and purchaser summons: *Ibid.* at p. 552.

Damages for the loss of possession, owing to the vendor's wilful refusal to complete, were given in *Jaques v. Millar*, 1877, 6 Ch. D. 153. In consequence of the lessor's wilful refusal to

Vendor's
wilful refusal.

grant a lease, the lessee, who, as the lessor knew, intended to commence a trade on the property, was unable for fifteen weeks to commence his trade. The Court granted specific performance of the contract, and damages.

The principle that the vendor's wilful refusal to complete entitles the purchaser to damages for the loss of possession was extended in the case of *Jones v. Gardiner*, (1902) 1 Ch. 191, where Byrne, J., gave the purchaser damages for the loss of possession on the ground that the vendor had not cared or troubled or taken reasonable pains to perform his contract.

As to the measure of damages for loss of possession, see above, p. 134.

Refusal of
vendor's
tenant to
quit.

A condition that the purchaser shall be "let into possession" on a given day does not amount to an agreement by the vendor that the person in occupation of the property will actually go out on or before that day, but merely that the purchaser shall be *legally* entitled to take possession; the condition, therefore, is not broken if the person in occupation of the property is too ill to move out, and the sheriff refuses to put him out: *Irish Land Commission v. Maquay*, 1891, 28 L. R. Ir. 342.

Time of
essence.

In contracts where time is of the essence, a defect in title must be cleared up before the day fixed for possession, unless the contract provides for "possession" and "completion" on different days. If possession with a good title cannot be given on the day fixed, the purchaser may, where time is of the essence, rescind, or, if he elect to complete, he will be entitled to compensation: *Gedye v. Montrose*, 1858, 26 Beav. 45. *Qu.* as to the purchaser being entitled to compensation.

Purchaser
compelled to
give up
possession.

A purchaser in possession, the day for completion being past and no objection having been taken to the title, can be required to pay the purchase money into Court, or else to give up possession. In *Greenwood v. Turner*, (1891) 2 Ch. 144, where the purchaser had been in possession nearly nine months, he was ordered to pay the purchase money with interest on a given day (a month after the order), or to give up possession on that day, and, in the event of giving up possession, to pay interest up to that date. If the purchaser has done anything to prejudice the value of the property as a security for the

purchase money (*e.g.* turning out weekly tenants or raising and selling coal), he will be ordered to pay the purchase money into Court without the option of giving up possession: *Pope v. G. E. R.*, 1866, 3 Eq. 171; *Lewis v. James*, 1886, 32 Ch. D. 326; and see further as to deterioration of the property during the purchaser's possession, p. 352, below.

In the absence of any stipulation that the purchaser shall pay an occupation rent in case the purchase goes off, the purchaser who has been allowed to take possession before he has accepted the title or paid the purchase money cannot be made to pay an occupation rent, if he rescinds because the vendor has no title, although his occupation has been beneficial: *Winterbottom v. Ingham*, 1846, 7 Q. B. 611. See also *Williams v. Shaw*, 1825, 3 Russ. 178 *n*, where the purchaser actually stated in his answer that he was willing to pay a fair rent for his occupation on having his deposit repaid him with interest; but that was a suit by the vendor for specific performance, and the matter turned on the pleadings.

Occupation
rent by
purchaser.

If the purchaser remains in possession after rescission he will have to pay rent for his subsequent occupation, as tenant at will: *Howard v. Shaw*, 1841, 8 M. & W. 118. The distinction is made on the ground that the purchaser, until the contract goes off, is in under the contract, which shows that he was to occupy rent free, but that after the contract goes off the purchaser cannot claim a right to occupy under it.

(x) RENTS AND PROFITS

(a) *Before the date fixed for completion*

In the absence of stipulation, the vendor is entitled to the rents and profits up to the date fixed for completion.

If no date has been fixed for completion, the vendor will, it is considered, be entitled to the rents and profits up to the date of actual completion.

Rent accruing before but payable after the date fixed for completion will not, it is suggested, in the absence of stipulation be apportioned. The writer is not aware of any English case on the subject. There seems to be no reason why the Apportion-

ment Act, 1870, should apply as between vendor and purchaser. In Ireland it has been held that the vendor is not entitled to have the rent apportioned. *Re Dawson*, 1884, 21 L. R. Ir. 441.

“Profits.”

The “profits” to which the vendor is entitled until completion, whether under the general law or by a special condition, include crops cut before the date fixed for completion, and fruit gathered and plantation thinnings made before that date; also, in the case of a manor, fines and heriots becoming payable before the date fixed for completion.

Timber and minerals.

There is an analogy, though not a perfect one, between the case of a vendor remaining in possession and that of a tenant for life punishable for waste. In both cases “profits” are distinguished from the land or the inheritance, and it may be said roughly that timber and minerals are part of the land, and not “profits,” and cannot be cut or gotten by the tenant for life or the vendor for his own benefit. What is called “waste” in the case of a tenant for life is called “deterioration” in the case of a vendor. As to deterioration, see below, p. 347.

Windfalls.

Windfalls—i.e. timber blown down after the contract—belong to the purchaser: *Poole v. Shergold*, 1786, 2 Bro. C. C. 118.

Royalties.

Royalties paid under a lease of a quarry belong to the vendor as rents and profits, whether under the general law, or under a condition that the vendor shall have the rents and profits: *Leppington v. Freeman*, 1891, 66 L. T. 357.

Fines.

On the sale of a manor, the vendor is entitled to all fines payable before the date fixed for completion, though not actually paid before that date: *Cuddon v. Tite*, 1858, 1 Giff. 395.

A condition that the purchaser shall be entitled to “the rents and profits of such parts of the estate as are let” does not give him any profits derived otherwise than from letting—e.g. a manorial fine: *Hardwicke v. Sandys*, 1844, 12 M. & W. 761.

Growing crops.

After a sale in May of land, including hay and growing crops, completion being fixed for 24th June, by a subsequent agreement the time for completing was extended to 28th September. The Court held that the purchaser was by the alteration deprived of his right to the hay and growing crops: *Webster v. Donaldson*, 1865, 34 Beav. 451.

The purchaser was, after the execution of the conveyance, held entitled under the express words of a local Act to receive moneys payable by Drainage Commissioners by way of reimbursement "to the owners and proprietors of lands by and at whose expense certain banks should be made their heirs and assigns," for expenses borne by the vendor and repayable after the execution of the conveyance, which moneys had not been excepted from the contract of sale or the conveyance : *King v. Witham Nav.*, 1820, 3 B. & Ald. 454. Drainage expenses reimbursed.

After the sale of a freehold house "with possession on the 25th March," the vendor's lessee, whose lease expired on that day, gave up possession in February without prejudice to his liability to repair under a covenant in the lease. The purchaser claimed to be entitled to the benefit of the covenant to repair, but it was held that he was simply entitled to possession, and that the benefit of the covenant belonged to the vendor, and was not included in the contract of sale : *Edie and Brown*, 1888, 58 L. T. 307. Covenant to repair.

(b) *After the date fixed for completion*

In the absence of stipulation, the purchaser is entitled to the rents and profits as from the date fixed for completion, and if no date is fixed, then, probably, only as from the date of actual completion. As to apportionment of rent accruing before but payable after the date fixed, see above, p. 337.

In *De Visme v. De Visme*, 1849, 1 Mac. & G. 336, a condition that "the purchaser should pay the remainder of the purchase money on 26th December, and that on payment thereof he was to be let into possession, or receipt of the rents and profits, as from the 25th December, and in case of default in the payment of the purchase money, from whatever cause, should pay interest," was held not to entitle the purchaser to the rents except from the time when the vendor was ready to complete : but this decision is doubtful ; see above, p. 319. In cases where, owing to the vendor's default, no interest is payable by the purchaser, the purchaser is not necessarily deprived of the rents and profits. The condition, as usually framed, gives the purchaser the rents and profits from the date fixed for

completion, independently of the purchaser's liability under the same condition to pay interest.

A condition that, in case completion is delayed beyond the date fixed, the vendor may at his option receive interest or the rents up to the day of actual completion, does not entitle the vendor if he elects to take the rents to anything more than the rents which he in fact receives; he cannot require the purchaser to make any payment in respect of the apportioned parts of the rents current at the date of actual completion, even though an earlier part of the condition provided for apportionment of rent up to the date fixed for completion: *Barsht v. Tagg*, (1900) 1 Ch. at p. 235.

In the absence of stipulation the vendor must account for any rent which he receives after the date fixed for completion; but, unless there are special circumstances, the rule seems to be that the vendor is not liable for more than the rent which he has actually received. If there is any evidence of neglect or mismanagement, the vendor will be charged on the footing of wilful default—*i.e.* will have to account for the rents which he has received, or which, but for his wilful neglect or default, he might have received. See *Sherwin v. Shakspear*, 1854, 5 D. M. & G. 517, for the general rule.

Pending the completion of the sale, the powers of the vendor as owner of the property are, as between him and the purchaser, suspended; the vendor being regarded (in the event of the sale being completed) as having been a trustee for the purchaser. It is the vendor's duty to let the property if vacant, giving previous notice to the purchaser of his intention: *Egmont v. Smith*, 1877, 6 Ch. D. 469. If the tenant gives up possession through a mistaken construction of an agreement entered into between him and the purchaser, the vendor is not liable: *Harford v. Purrier*, 1816, 1 Mad. 532.

If the purchaser prefers to have the property unlet, then the liability of the vendor ceases: *Egmont v. Smith*, 1877, 6 Ch. D. at p. 476. The purchaser so electing must guarantee the vendor against any loss in case the purchase goes off.

If the purchaser wishes a tenant to remain in occupation the vendor must not determine the tenancy; and, if the pur-

chaser is himself in occupation under an agreement with the vendor, the vendor must not determine his occupation. If the vendor does determine any tenancy against the purchaser's will, the vendor will be liable to the purchaser for any loss thereby accruing : *Raffety v. Schofield*, (1897) 1 Ch. 937.

In the case of houses let in rooms to weekly tenants, the vendor must not only keep the houses, as far as he reasonably can, properly tenanted, but if he employs an agent to collect the rents he must see that the agent does his work with reasonable efficiency, and if the agent is not satisfactory the vendor ought to consult with the purchaser as to what should be done : *Malone v. Henshaw*, 1891, 29 L. R. Ir. at p. 361.

But though he is in some respects treated as a trustee for the purchaser, the vendor has a paramount right to have his own interests protected : *Shaw v. Foster*, 1872, L. R. 5 H. L. 321. And where necessary the Court will appoint a receiver—for instance, where completion is delayed owing to a dispute as to title and the vendor and purchaser cannot agree as to the letting of the property. See further p. 353, below.

The following illustrations show what are special circumstances sufficient to charge the vendor on the footing of wilful default :

Vendor when charged with rents not actually received.

Allowing the tenants to run in arrear : *Acland v. Gaisford*, 1816, 2 Mad. 28 ; *Wilson v. Clapham*, 1819, 1 Jac. & W. 36. But a reduction of rents is not in itself *primâ facie* evidence of mismanagement, so as to justify an inquiry : *Sherwin v. Shakspear*, 1854, 5 D. M. & G. at p. 537.

Neglect to attempt to procure a tenant, or to preserve the property from dilapidation : *Phillips v. Silvester*, 1872, 8 Ch. 173.

When not charged on the footing of wilful default, the vendor in accounting for profits is entitled to be allowed his expenses of realising the crops ; and if a farm falls vacant, and the vendor instead of letting it farms it himself, he is entitled in his account of profits to deduct the valuation which he had to pay to the outgoing tenant : *Bennett v. Stone*, (1902) 1 Ch. 226.

If the vendor remains in possession and receives rents after the day fixed for completion (the completion being delayed by the purchaser's untenable objection to title), the vendor, if he

elects to receive interest under the condition for interest, is not entitled to apply any portion of the rent so received in payment of arrears of rent due at the date of the contract or before the date fixed for completion : *Plews v. Samuel*, (1904) 1 Ch. 464.

Occupation
rent by
vendor.

If the vendor is in personal occupation of the property, he must, if in default, or if his occupation is not necessary for the purpose of preserving the property or preventing a depreciation of the value of the property, pay a rent for the period of his occupation after the date fixed for giving the purchaser possession. This seems to be the rule to be deduced from the cases. In *Dyer v. Hargrave*, 1805, 10 Ves. at p. 511 ; *Sherwin v. Shakspear*, 1854, 5 D. M. & G. 517 ; and *Metropolitan Ry. Co. v. Defries*, 1877, 2 Q. B. D. 189, 387, an occupation rent was enforced ; and in all these cases the vendor was in default. In *Dakin v. Cope*, 1827, 2 Russ. 170, and *Leggott v. Metropolitan Ry. Co.*, 1870, 5 Ch. 716, an occupation rent was not enforced, and there the purchaser was in default, and the vendor's occupation was necessary, the houses being used for the business of a licensed victualler.

" Rents and
profits " when
vendor in
occupation.

The words " rents and profits " in a condition of sale have been taken to imply an occupation rent if the vendor is in occupation : per Field, J., in *Metropolitan Ry. Co. v. Defries*, 1877, 2 Q. B. D. 189. But a condition that " the purchaser shall be entitled to the possession or the receipt of the rents and profits " from a certain date was construed as meaning, in the case of land of which the vendor is himself in occupation, vacant possession by the purchaser, the words " rents and profits " being otiose and ineffectual : *Anker v. Franklin*, 1880, 43 L. T. 317. And evidence of a parol agreement that the vendor should pay rent was not admitted for the purpose of proving the meaning of the words " rents and profits " : *Ibid.*

The vendor cannot be charged with an occupation rent after an order for specific performance has been made not charging him on the footing of wilful default : *Bennett v. Stone*, (1902) 1 Ch. 226.

(xi) OUTGOINGS

In the absence of any stipulation on the subject, the vendor must bear all outgoing down to the time when a good title was first shown, so that the purchaser could prudently take possession, and as from that time the outgoing must be borne by the purchaser : *Carrodus v. Sharp*, 1855, 20 Beav. 56 ; *Barsht v. Tagg*, (1900) 1 Ch. 231.

In the absence of stipulation, outgoing are, it is suggested, not apportionable. In Ireland, at any rate, outgoing—*e.g.* head rent—are not apportioned : see *Re Keillor*, 1871, Ir. R. 6 Eq. 329. In *Lawes v. Gibson*, 1865, 1 Eq. 135, rent was apportioned, but there was a condition as to “clearing” outgoing up to the date fixed for completion. And see above, p. 337.

It is not clear whether the mere fixing of a date for completion without any mention of outgoing would fix the date at which the vendor’s liability for outgoing is to determine and the purchaser’s liability to begin. In *Carrodus v. Sharp, ubi sup.*, it is not stated whether any date was fixed for completion ; and in *Barsht v. Tagg, ubi sup.*, there was an express stipulation as to outgoing ; moreover, the title was accepted on or before the date fixed for completion. Probably the mere fixing of a date for completion would be sufficient to fix the date at which the purchaser’s liability for outgoing is to begin ; but see *De Visme v. De Visme*, 1849, 1 Mac. & G. 336 (above, p. 339), where an express agreement as to the date at which the purchaser was to have the *rents* was disregarded.

On a sale of leaseholds, under a condition fixing a date for completion other than a quarter-day and saying “all outgoing up to that day being cleared by the vendor,” the vendor must pay or allow the purchaser an apportioned part of the current rent from the last quarter-day to the date fixed for completion : *Lawes v. Gibson*, 1865, 1 Eq. 135. In Ireland it has been held that outgoing—*e.g.* a head rent—are not apportionable in the absence of express stipulation : *Re Keillor*, 1871, Ir. R. 6 Eq. 329.

In the condition “all rents, rates, taxes, and outgoing payable in respect of the premises shall be received and discharged by the vendor up to the time of completion, such rents and outgoing

Conditions as to outgoing.

being apportioned if necessary," the outgoings referred to in the first part of the conditions comprise not only those capable of apportionment, but also those not apportionable—*e.g.* paving expenses : *Midgley v. Coppock*, 1879, 4 Ex. D. 309.

Fire
insurance
premiums.

Fire insurance premiums falling due after the day fixed for completion are, in the case of leaseholds liable to forfeiture in case of the lessee's failure to insure, outgoings which the purchaser is under the general law and within the condition bound to bear : *Dowson v. Solomon*, 1859, 1 Dr. & Sm. 1.

Vendor
carrying on
business.

A loss incurred by the vendor in carrying on a business is not an outgoing which the purchaser must bear in case he delays completion, even though the carrying on of the business was necessary in order to prevent the depreciation of the property—*e.g.* in the case of a public house, where the licence might have been lost (*Dakin v. Cope*, 1827, 2 Russ. 170), or in the case of a farm, where the vendor cultivated the land at a loss to prevent deterioration : *Bennett v. Stone*, (1902) 1 Ch. 226.

Fines.

On the sale of copyholds a fine payable in consequence of the death of the vendor (a trustee for sale) is borne by the trust estate : *Paramore v. Greenslade*, 1853, 1 Sm. & G. 541.

Paving ex-
penses &c.

The most difficult class of cases is that of work done pursuant to a notice by a local authority. Outgoings, whether under the general law or under a condition referring to outgoings, comprise such matters as paving expenses (*Midgley v. Coppock*, 1879, 4 Ex. D. 309), the demolition of dangerous structures (*Tubbs v. Wynne*, (1897) 1 Q. B. 74), and the abatement of nuisances (*Barshl v. Tagg*, (1900) 1 Ch. 231). The difficulty, however, is not so much whether the expense is an "outgoing," but at what date the expense is incurred, whether before or after the purchaser becomes liable for outgoings. In some cases the completion of the work, in others the apportionment of the expenses, is the date which fixes the liability. In the following enumeration, in addition to cases between vendor and purchaser, are included other cases, which discuss the date when the expense becomes a charge on the property; but the latter cases are not necessarily authorities on the point of the liability of vendors and purchasers.

Under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), the expense becomes a charge on the property as soon as the notice of apportionment is given, even though the work has not been commenced : *Wix v. Rutson*, (1899) 1 Q. B. 474.

But the expenses of demolition pursuant to a magistrate's order, made before the date fixed for completion, under the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), have been held to be an outgoing payable by the vendor under the condition, although the work was not done till after the date fixed for completion : *Tubbs v. Wynne*, (1897) 1 Q. B. 74. The distinction is between a magistrate's order which may well be taken as fixing the liability and a mere notice by a local authority : *Allen and Driscoll*, (1904) 2 Ch. at p. 231. Moreover, in that case there was a condition whereby the vendor "reserved the right to comply with the requirements of the local authority with respect to the condition of the buildings before completion of the purchase, notice having been served to pull down."

Where the work was done under sect. 62 of the Local Government Act, 1858, the expense was held to be a charge as soon as the work was completed, and the period of twelve years fixed by sect. 8 of the Real Property Limitation Act, 1874, began to run from that date, and not from the date of apportionment, notice, or demand : *Hornsey case*, 1889, 24 Q. B. D. 1.

Under the Public Health Act, 1875, the date at which the work is completed by the local authority is the date at which the liability is fixed : sects. 150 and 257. The fact that the final demand for payment has not been made is immaterial ; the expense becomes a charge on the property as soon as the work is completed. If the property is sold before the work is completed, then, as between the vendor and the local authority, the vendor is not liable (*Reg. v. Swindon, &c.*, 1879. 4 Q. B. D. 305), and as between the vendor and purchaser the purchaser has to bear the expense : *Allen and Driscoll*, (1904) 2 Ch. 226. If the property is sold after the work is completed, then not only is the vendor liable (when the time to pay comes) as between himself and the local authority (*Millard v. Balby*, (1905) 1 K. B. 60), but, as between the vendor and the purchaser, the vendor is, even without express stipulation, bound to bear the expense :

Bettesworth and Richer, 1888, 37 Ch. D. 535. But, as between tenant for life liable for "outgoings" and remainderman, where the work was completed in the lifetime of the tenant for life, but no apportionment or demand made till after his death, the expenses were held to be payable by the remainderman : *Re Boor*, 1889, 40 Ch. D. 572.

Under the Private Street Works Act, 1892, the expense becomes a charge on the property as from the date of the completion of the works : sect. 13, referring to the Public Health Act, 1875, s. 257. And if the property is sold after the completion of the works, the expense falls on the vendor, although the apportionment was made after the contract to sell : *Stock v. Meakin*, (1900) 1 Ch. 683.

Under a condition fixing a date for completion, and providing for the apportionment of the rent and outgoings up to that date, and providing that if completion is delayed the vendor shall at his option be entitled to interest at 6 per cent., or the rents up to the day of actual completion, the purchaser must bear the outgoings occurring after the date fixed for completion, even if the vendor elects to receive the rents instead of interest : *Barsht v. Tagg*, (1900) 1 Ch. 231. But in such a case the purchaser would not have to pay the vendor an apportioned part of the current rent as well, the vendor being only entitled to retain the rents which he actually receives : *Ibid*.

If the conditions do not expressly state that the vendor shall bear the outgoings, any outgoings discovered after the conveyance will, unless covered by the covenants for title, have to be borne by the purchaser although they arose before the day fixed for completion, and would, if discovered and pointed out before the execution of the conveyance, have had to be borne by the vendor. In *Egg v. Blayney*, 1888, 21 Q. B. D. 107, paving expenses apportioned under sect. 77 of the Metropolis Management Amendment Act, 1862, were held not to be a charge on the property, and therefore were not incumbrances within the covenants for title, although an order had been made for their payment by instalments before the contract for sale was entered into. *Semle*, paving expenses under the Public Health Act, 1875, would have been within the covenants : *Ibid*. Street

Outgoings
discovered
after
conveyance.

expenses under the Private Street Works Act, 1892 (which are a charge on the property as soon as the works are completed), are, if completed before the contract, "incumbrances" within the covenants for title : *Stock v. Meakin*, (1899) 2 Ch. 496.

An express condition that outgoings up to completion shall be discharged by the vendor was held to entitle the purchaser, notwithstanding the execution of the conveyance, to recover from the vendor the expenses of paving which had been done before the sale : *Midgley v. Coppock*, 1879, 4 Ex. D. 309. There the vendor and purchaser were alike ignorant of these expenses, the work having been completed before the vendor bought and no payment having been demanded by the local authority until after the conveyance was executed.

A condition (one of a set of general conditions employed locally) indemnifying the vendor against expenses "in complying with any requirement enforceable against him, and made after the sale by the local authority in respect of paving or sewerage," is not construed as an implied statement that no notice to pave has been served *before* the sale : *Leyland and Taylor*, (1900) 2 Ch. 625.

Implied statement as to paving notice.

(xii) DETERIORATION

Deterioration may be the result of accident or natural decay ; or it may be the result of neglect, or may be caused wilfully. Any deterioration arising after the contract has been entered into unless caused by the vendor's wilful acts or neglect must be borne by the purchaser ; for instance, loss through fire or flood or the fall of a house (if not attributable to the vendor's neglect after the contract) : *Robertson v. Skelton*, 1849, 12 Beav. 260 ; *Lysaght v. Edwards*, 1876, 2 Ch. D. at p. 507. In the case of a sale by the Court the date at which the purchaser's liability commences was said in *Robertson v. Skelton*, *ubi sup.*, to be the date of the order confirming the Master's report of the best purchaser ; for which we should now substitute the date at which the Master's certificate became absolute. But there seems no reason why the purchaser's liability for accidental loss should not commence on the date of the auction at which he

was the highest bidder. In the case of a notice to treat followed by an agreement for sale, the rights of the parties are fixed by the service of the notice : see *Phoenix v. Spooner*, (1905) 2 K. B. 753.

If by an accident—*e.g.* the fall of a house on the land sold—damage is done to adjoining buildings, the purchaser is liable to pay the vendor the amount which the vendor in consequence of a legal obligation had to expend in repairing the damage : *Robertson v. Skelton*, 1849, 12 Beav. 260.

On the sale of a public house, in the absence of an undertaking by the vendor that the licence shall be renewed at the next brewster sessions, or that he will obtain a transfer at the next special sessions, or interim authority to use the licence between the date fixed for completion and the next special sessions, all these matters are at the purchaser's risk : *Tadcaster, &c. v. Wilson*, (1897) 1 Ch. 705. The vendor is bound only to have a valid and effectual licence existing at the date fixed for completion, which he can indorse in the usual way : *Ibid.* See further, p. 397, below.

Insurance.

In the case of a house insured by the vendor against fire, the vendor is entitled to receive the full purchase money, although the house has been burnt and the insurance company has paid him the sum for which the house is insured. The purchaser is not, in the absence of stipulation, entitled to recover that sum from the vendor : *Rayner v. Preston*, 1881, 18 Ch. D. 1, following *Poole v. Adams*, 1864, 33 L. J. Ch. 639. If the vendor receives the full purchase money, the insurance company can, under the doctrine of subrogation, claim repayment of the insurance money paid by them to the vendor : *Castellain v. Preston*, 1883, 11 Q. B. D. 380. And if the vendor renounces his rights as against the purchaser the insurance company can, nevertheless, recover from the vendor the amount which he has given up to the purchaser : *West of England &c. v. Isaacs*, (1897) 1 Q. B. 226 ; *Phoenix v. Spooner*, (1905) 2 K. B. 753.

In the case of houses or buildings within the metropolis, the purchaser is entitled to require the insurance company to expend the insurance money in or towards rebuilding the house or buildings under the Fires Prevention (Metropolis) Act, 1774. But this Act applies only to houses and buildings ; moneys

payable in respect of trade fixtures are not within its operation : *Ex parte Gorely*, 1864, 4 D. J. & S. 477. It is doubtful whether the Act extends beyond the metropolis : *Westminster Fire Office v. Glasgow Provident*, 1888, 13 App. Ca. 699. In cases where the purchaser has no right against the insurance company under the above mentioned Act, it would seem that the purchaser has no remedy in the absence of express stipulation by the vendor.

The effect of a condition that the purchaser shall have the benefit of the vendor's insurance would seem to depend on whether the policy is assignable or not. If the policy is assignable the condition entitles the purchaser to an abatement of his purchase money to the extent of the amount received by the vendor from the insurance company, and as between the vendor and the insurance company the doctrine of subrogation does not arise. The vendor, owing to the condition of sale, has not received the full purchase money ; in other words, his loss has not been diminished by any payment from the purchaser, so that there is no advantage or right to an advantage into which the insurance company can claim to be subrogated. It is hardly necessary to distinguish the case of *West of England &c. v. Isaacs*, (1897) 1 Q. B. 226. There the insured, after the fire had occurred, gave up an accrued right of action which would have entitled him to have the loss made good by a third person. In the case, however, of the vendor agreeing that the purchaser shall have the benefit of the vendor's insurance, there is no accrued right which is being given up ; the vendor had no rights against the purchaser until the contract of sale, and he has only such rights as the contract of sale gives him. If the policy is expressed to be personal only to the vendor and not assignable by him, then, unless he obtains a waiver of this restriction from the insurance company, he will be bound by his condition to pay the purchaser a sum equal to that payable to him under his policy, and the insurance company would be entitled to set off against the insurance moneys payable by them to the vendor the full purchase money mentioned in the contract of sale.

Condition as
to insurance.

On the sale of leasehold property liable to forfeiture in case of the lessee's failure to keep up the fire insurance, where the conditions are silent as to outgoings or merely say that the

vendor shall be liable for outgoings after the day fixed for completion, it is the duty of the purchaser to pay any fire insurance premium that may fall due after the day fixed for completion; and if, owing to the non-renewal of the fire insurance policy after the day fixed for completion, the property is forfeited to the lessor, this loss falls on the purchaser: *Dowson v. Solomon*, 1859, 1 Dr. & Sm. 1. And if the purchaser knows or has notice from the abstract of title or the lease sent or shown to him that the property is liable to forfeiture in case the fire insurance is not kept up, the vendor is not bound voluntarily to inform him when the current insurance drops: it is the purchaser's duty to inquire: *Ibid.*

Vendor's
liability for
deterioration.

The vendor is liable for loss caused by him, or by his neglect, between the day on which the contract is entered into and the day on which the purchaser can prudently (having regard to the title shown by the vendor) take possession: *Foster v. Deacon*, 1818, 3 Mad. 394. In other words, the vendor may, if the state of his title is such that the purchaser can safely take possession, escape his liability for any subsequent deterioration by inviting the purchaser to take possession: *Phillips v. Silvester*, 1872, 8 Ch. 173. But he must not make it a condition that the purchaser shall first pay the purchase money: *Ibid.*

Where both the vendor and the purchaser, owing to a mistake, came to the conclusion that a good title had not been shown to the property, and entered into a new agreement giving the vendor further time for completion, and in consequence of such mistake the purchaser refused to take possession, the Court held that, notwithstanding the mistake, the purchaser must bear the loss arising from the deterioration of the property, since the state of the title was such that he ought to have taken possession: *Minchin v. Nance*, 1841, 4 Beav. 332.

The vendor is liable not only for wilful deterioration or waste—*e.g.* cutting timber and getting minerals—but for permissive deterioration—*e.g.* allowing the land to go out of cultivation or the buildings to become dilapidated (*Foster v. Deacon*, 1818, 3 Mad. 394; *Hoggart v. Scott*, 1830, Taml. 500) or merely using the land in an unhusbandlike manner: *Ferguson v. Tadman*, 1827, 1 Si. 530. And the vendor is liable not only for his own

neglect to cultivate, but for the neglect of his tenant: *Foster v. Deacon*, *ubi sup.*

The removal of soil by a trespasser, if the vendor has not taken reasonable care to prevent it, is deterioration for which the vendor is liable: *Clarke v. Ramuz*, (1891) 2 Q. B. 456. Similarly, the breaking of windows and damage done to a house by vagrants which might have been prevented by reasonable care: *Royal Bristol, &c. v. Bomash*, 1887, 35 Ch. D. 398.

The demolition of unsuitable buildings is not deterioration, if the demolition does not diminish the selling value of the property: *Krehl v. Park*, 1874, 31 L. T. 325.

If the expense of the necessary repairs are greater than those which the property will bear the vendor will probably be able to escape liability by giving the purchaser notice that unless he provides the necessary funds the vendor will leave the property to take its chance: per Lord Selborne in *Phillips v. Silvester*, 1872, 8 Ch. 173.

If the vendor has committed or allowed any deterioration, he is liable to pay the purchaser damages or compensation: *Phillips v. Silvester*, *ubi sup.* It is not, perhaps, important to settle whether "damages" or "compensation" is the more correct expression. Kekewich, J., uses the phrase, "damages in the nature of compensation." The liability of the vendor is founded on the principle that he is a trustee for the purchaser; so "damages" may be used on the analogy of the expression damages for a breach of trust. The word "damages" is used in *Phelps v. Prothero*, 1855, 7 D. M. & G. 722.

Damages payable by vendor.

The damages or compensation to be given for wilful deterioration differ from the penal damages awarded against a mere trespasser. In the case of a vendor working a coal mine after the signing of the contract, the measure of damages is the market value of the coal *in situ naturali*, calculating that value upon what the coal would sell for, and deducting therefrom the expense not only of carrying it to market, but of severing it from the freehold: *Brown v. Dibbs*, 1877, 37 L. T. 171. The profit made by the vendor is not necessarily the measure of damages, because he may have worked in an unprofitable manner: *Nelson v. Bridges*, 1839, 2 Beav. 239. In the case of a

Assessment of damages.

trespasser working coal in his neighbour's land, the measure of damages is the value of the coal when gotten, without deducting the expense of severing it from the freehold, but allowing the expense of bringing it to the pit's mouth : *Martin v. Porter*, 1839, 5 M. & W. 351. See, further, as to damages for trespass in wayleave cases, *Jegon v. Vivian*, 1871, 6 Ch. 742, and *Phillips v. Homfray*, 1871, 6 Ch. 770 ; and as to trespass by tipping spoil, *Whitwham v. Westminster, &c.*, (1896) 2 Ch. 538 ; also as to innocent trespassers, *Livingstone v. Rawyard's Coal Co.*, 1880, 5 App. Ca. 25, and *Dreyfus v. Peruvian Guano Co.*, 1889, 42 Ch. D. at p. 77.

Irremediable
deterioration.

If the deterioration committed or permitted by the vendor makes the property essentially different from what it was when the contract was signed, or from the description given by the vendor, the purchaser will be entitled at his option to rescind, or receive compensation. Thus, if the vendor cut ornamental timber, this makes the property essentially different, and entitles the purchaser to rescind : *Magennis v. Fallon*, 1829, 2 Mol. 561. If the vendor cut ordinary timber, this is a deterioration which can be compensated for : *Ibid.*

If, on a sale of a lease containing a covenant to insure with forfeiture in case of non-performance of covenants, the vendor neglects to pay a premium falling due before actual completion, the completion having been delayed by the vendor's default, the purchaser may rescind, because the failure of the vendor to insure has rendered the lease liable to forfeiture, and the title is therefore defective : *Palmer v. Goren*, 1856, 4 W. R. 688. If the lessor waived the forfeiture, the sale would probably be enforced.

After
conveyance.

If the deterioration was unknown to the purchaser at the time of completion, the execution of the conveyance will not preclude him from obtaining compensation : *Clarke v. Ramuz*, (1891) 2 Q. B. 456.

Purchaser
liable for
deterioration.

A purchaser who alters the property during his possession will, in case the purchase falls through, be compelled to reinstate the property or give compensation. In *Donovan v. Fricker*, 1821, Jac. 165, the purchaser had converted a dwelling house into a shop, and was compelled to restore the house to its former

condition. (The case is not reported as to this point, but the decree is given in the report at pp. 165, 166.) In a contract for the sale of a house to the School Board, a clause that the Board should be entitled to possession upon depositing the purchase money, and should not be considered as accepting the vendor's title, was held to give the Board the right after taking possession to pull down the house, since the vendor knew at the date of the contract that their object in purchasing was to build a school: *Bolton v. London School Board*, 1878, 7 Ch. D. 766.

Where the purchaser has taken possession, the Court will, if Receiver. necessary, appoint a receiver to protect the property from deterioration: *Cook v. Andrews*, (1897) 1 Ch. 266 (vendor's action for rescission). And a receiver may be appointed even on the purchaser's application; thus in *Gibbs v. David*, 1875, 20 Eq. 373, the Court appointed a receiver and manager to work a coal mine, the purchaser (who was in possession and was plaintiff in an action for rescission, and made the application) supplying the means of working.

In *Crockford v. Alexander*, 1808, 15 Ves. 138, a purchaser was Injunction. restrained by injunction from felling timber.

(xiii) IMPROVEMENTS

The purchaser will be allowed compensation for substantial Improvements by purchaser. improvements made by him, though the sale is rescinded because of his default or fraud (see *Donovan v. Fricker*, 1821, Jac. 165), and will, of course, be allowed compensation for necessary repairs: Sug. 254. But the purchaser will not be allowed compensation for improvements made by him before contracting to purchase, if the sale is rescinded because of the vendor's defect in title: *Worthington v. Warrington*, 1849, 8 C. B. 134 (lessee with option of purchase), approved by C. A. in *Schreiber v. Dinkel*, 1886, 54 L. T. 911.

And where the sale has been set aside, after conveyance, on the ground of fraud or "common mistake," the purchaser has been allowed compensation for repairs and improvements executed by him before the discovery of the fraud or mistake: *Edwards v. M'Leay*, 1815, 2 Sw. at p. 289.

Repairs by
vendor.

If the vendor has had to pay money out of his own pocket to do repairs unremunerative to him, but necessary for the preservation of the property, he will be entitled to recover this money as damages in his action for specific performance against a purchaser who was all along in default: *Bolton v. Lambert*, 1889, 41 Ch. D. at p. 302.

Improvements by
vendor.

It was said in *Monro v. Taylor*, 1850, 8 Ha. at p. 60, referring to *Clare Hall v. Harding*, 1848, 6 Ha. 296 (which was a case not of a purchaser, but of an adverse claimant to the property), that the purchaser cannot be called on to repay the money which the vendor has chosen to spend in improving the property. But the expenditure in *Monro v. Taylor* was the expense of procuring a renewal of a church lease, and it may be doubted whether the purchaser could claim the benefit of the renewal without paying the cost of renewal.

CHAPTER XXIV

RESCISSION BY VENDOR

	PAGE
(i) In the absence of Stipulation	355
(ii) What objections are covered by the Condition.	355
(iii) Vendor's unwillingness	365
(iv) Steps to be taken by the Vendor	369
(v) Waiver by the Vendor	370
(vi) Vendor rescinding and afterwards wishing to complete	373
(vii) Unusual forms of the Condition	374
(viii) Procedure	375

(i) IN THE ABSENCE OF STIPULATION

IN the absence of stipulation the vendor is not entitled to rescind on the ground of unwillingness or inability to comply with the purchaser's just requisitions. If it is in the vendor's power to make good a representation or undertaking contained in the contract, the purchaser can require him to do so, unless this would lead to a breach of trust or contravene some express enactment, or be prejudicial to the interests of third persons in the property sold, or would inflict great hardship on the vendor: see above, p. 95. And when the vendor's title is defective, or he has misdescribed the property, or has given an undertaking which he cannot make good, the purchaser is entitled to recover his deposit and the expenses of investigating the title, unless the matter admits of compensation, in which case the vendor must (if the purchaser requires it) complete with an abatement of the purchase money: see above, p. 99. As to the vendor's right to rescind on the ground of the purchaser's default, see above, p. 309.

(ii) WHAT OBJECTIONS ARE COVERED BY THE CONDITION

Conditions for rescission are variously worded as regards the nature of the objections to which they apply. Sometimes

the condition only covers "objections to title" or "objections and requisitions." A wider form includes "requisitions as to conveyance," and an even wider form is sometimes used, covering "objections or requisitions as to the title, particulars, conditions or any other matter or thing relating or incidental to the sale."

However widely the condition may be worded, the Court will not allow the vendor to use the condition so as to enable him to commit a fraud; he may not rescind on the purchaser objecting to the vendor's fraudulent misrepresentation, nor may he rescind if he knew beforehand of the defect objected to unless he had reasonably thought the defect could be cured; nor may the vendor rescind under the condition, if he has no title at all. Sometimes it is said that the condition was "not intended to apply" to such cases; but it is not really a question of construction—the Court interferes with the contract to prevent a fraud being committed. Compare the treatment of conditions as to compensation: see above, p. 289.

Fraudulent
use of the
condition.

The condition for rescission will not entitle the vendor to rescind if, having a perfect title, he has fraudulently delivered an imperfect abstract with the view of inducing the purchaser to deliver and insist on requisitions so as to enable him to rescind under the condition; per Wigram, V.-C., in *Morley v. Cook*, 1842, 2 Ha. at p. 114; and per Blackburn, J., in *Gray v. Fowler*, 1873, L. R. 8 Ex. at p. 282.

Fraudulent
misrepresentation.

The condition will not entitle the vendor to rescind if he has been guilty of intentional misrepresentation: see *Price v. Macaulay*, 1852, 2 D. M. & G. at p. 347.

Misrepresentation
without fraud.

It has even been said that a misrepresentation which is not fraudulent will disentitle the vendor from acting under the condition: *Holliwell v. Seacombe*, (1906) 1 Ch. at p. 432. But it may be doubted whether this is not going too far. If the condition covers the objection, then, it is submitted, the vendor's power to rescind cannot rightly be taken from him in order to punish his carelessness, or for any other reason short of the prevention of a fraud or a gross injustice, such as compelling the purchaser to complete when the vendor has no title at all. The case might conceivably (though not properly) have been

treated as one where the vendor had no title at all, the land having been described as "building land," whereas it was subject to restrictions against building anything but almshouses. Or it might possibly have been treated as one where the condition covered only requisitions as to title and not misdescriptions. But it was not decided on either of these grounds ; it was decided on the ground that the misrepresentation entitled the purchaser to have the contract including the condition in question rescinded, on the analogy of the cases on conditions as to compensation, referring to Lindley, L. J.'s remarks in *Terry and White*, 1886, 32 Ch. D. at p. 29. *Holliwell v. Seacombe* may perhaps be distinguished as a sale by the Court, but this seems an inadequate distinction.

The question whether the misdescription is covered by the condition is an entirely different question from that raised in *Holliwell v. Seacombe*, *ubi sup.* The question of course arises when the condition only covers requisitions as to title. With regard to misdescriptions which do not involve matters of title, the vendor cannot rescind under a condition which only covers requisitions as to title : see *Painter v. Newby*, 1853, 11 Ha. 26, stated below, p. 364. With regard to misdescriptions involving questions of title, it seems reasonably clear that if the title is not admitted or proved to be defective, the condition will enable the vendor to rescind ; but it is not clear whether if the purchaser proves the title to be defective the vendor can rescind under the condition. The purchaser's requisition may in one sense be termed a requisition as to title, but it may also be regarded as an objection to a misdescription, and, if so, it is not covered by a condition which only applies to objections or requisitions as to title. In *Holliwell v. Seacombe*, (1906) 1 Ch. 426, which, as above mentioned, was not decided on this ground, the condition was not expressly limited to requisitions as to title. In the absence of any authority on the point the writer ventures (in spite of the decision of *Holliwell v. Seacombe*) to express the opinion that a misdescription which involves a matter of title is covered by a condition for rescission expressly limited to requisitions as to title.

To illustrate the difference between descriptions which do,

and those which do not, involve matters of title, it may be said that the description "building land" involves a matter of title, whilst the description "in the county of Essex" does not. Again the description of the property as containing so many acres is a misdescription which does not involve a question of title, if the acreage is less than described; but if the vendor's title is defective as to some acres there is a question of title, but no misdescription. The words "objection or requisition" were held to cover an objection by the purchaser that the vendors had described the property as containing 5 acres, but as to $1\frac{1}{2}$ acres thereof could only show a short possessory title, and the vendors having rescinded under the condition the purchaser's action for specific performance with compensation was dismissed: *Heppenstall v. Hose*, 1884, 51 L. T. 589. See further, on this point, pp. 362 to 365 below.

Defects
known to
the vendor.

The condition will not entitle the vendor to rescind in the case of a serious defect known to him at the date of the contract, unless the purchaser also knew or had notice of the defect: *Nelthorpe v. Holgate*, 1844, 1 Coll. 203; *Jackson and Haden*, (1906) 1 Ch. 412. Thus, where the vendor's mother was, as the vendor knew, life tenant of the property, and had not agreed to concur in the sale, the purchaser was allowed to insist on compensation, notwithstanding the condition: *Nelthorpe v. Holgate*, *ubi sup.*

But if the vendor, though knowing of the defect, had reasonably thought it could be cured, he may rely on the condition for rescission. "If," said Knight-Bruce, V.-C., in the last-mentioned case, at p. 222, "Mr. Holgate had satisfied the Court that he entered into the contract in ignorance of his mother's life estate, or under a mistaken notion that he was entitled to sell, and could make a title to the fee simple in possession without her concurrence, or in consequence of any promise or representation on her part that she would concur in the sale, the case would have been different."

Similarly where the vendor, having a term less three days, had sold the full term relying on the verbal promise of the parties in whom the leasehold reversion (the three days) was vested, and they afterwards refused to concur in the con-

veyance, he was held entitled to rescind under the condition : *Duddell v. Simpson*, 1866, 2 Ch. 102.

The existence of slight defects in the title or the inability of the vendor to prove facts on which his title depends would not, it is conceived, preclude the vendor from acting under the condition even where the vendor knew of the defect or want of proof before entering into the contract.

The words "objection to title" include objections to title in respect of matters not disclosed by the abstract even if the concealment was intentional, provided it was *bonâ fide* : *Gray v. Fowler*, 1873, L. R. 8 Ex. 249. If the matters were fraudulently concealed, the condition would not apply : *Ibid.* 282 ; see above, p. 356.

Defects not appearing in abstract.

The condition will not enable the vendor to rescind if he shows no title at all. In such a case, the purchaser will be entitled to recover his deposit and expenses, notwithstanding the condition for rescission : *Bowman v. Hyland*, 1878, 8 Ch. D. 588. Hall, V.-C., there said that the matter was not one capable of being "complied with," and was not that which was within the contemplation of the parties when the condition was framed. In that case the vendors had agreed to sell the fee, having only the residue of a term which expired shortly after the date of the contract, and the persons entitled to the reversion had entered and taken possession. North, J., in *Heppenstall v. Hose*, 1884, 51 L. T. 589, says that the decision in *Bowman v. Hyland* is to be limited to the case where the vendor "shows no title whatever to any part of the property." And in *Williams v. Edwards*, 1827, 2 Sim. 78, it was held that the condition applied, although as to one-third of the property the vendor was entitled only to an estate *pur autre vie*, and not in fee. See also *Scott and Alvarez*, (1895) 2 Ch. 603, and *Deighton and Harris*, (1898) 1 Ch. 458. Where the vendor has an under-lease at a peppercorn expiring more than thirty years after the contract, and is possibly entitled in fee simple, this is not a case of the vendor having "no title at all," and the vendor may rescind under the condition : *Isaacs v. Towell*, (1898) 2 Ch. 285. Absence of title to the minerals is not a case of "no title at all" : *Jackson and Haden*, (1906) 1 Ch. at pp. 419 and 424. Having

No title at all.

no title to one (and part of another) of four plots of land is not equivalent to having "no title at all": *Ramuz and Edwards*, 1893, 37 Sol. J. 701. See further as to what "no title at all" means, p. 234, above.

A fortiori, if a property were deliberately offered for sale by a vendor, knowing he had no title at all, the condition for rescission would not enable him to escape his liability to the purchaser: see *Heppenstall v. Hose*, 1884, 51 L. T. 589. Probably, in such a case the purchaser would be able to recover not only his expenses, but damages for the loss of his bargain, the vendor's conduct being considered fraudulent: see above, p. 130.

Requisitions
as to convey-
ance.

It has been said that the condition for rescission does not entitle the vendor to rescind for a requisition as to the conveyance unless this is expressly referred to in the condition: *Kitchen v. Palmer*, 1877, 46 L. J. Ch. 611. But the words "objection or requisition as to the title, particulars, conditions or any other matter or thing relating or incidental to the sale" were held to include a requisition as to conveyance: *Deighton and Harris*, (1898) 1 Ch. 458.

Pearson, J., in *Hardman v. Child*, 1885, 28 Ch. D. 712, gives it as his opinion, that the inclusion of "requisitions as to conveyance" is improper; but this form of the condition would probably be now held to be unobjectionable, as the Court will take care that the vendor does not make an unreasonable use of his power under the condition: see below, p. 365.

A condition for rescission in case of "requisitions in respect of the conveyance" does not enable the vendor to rescind on the ground of the objection of a purchaser to an alteration in the draft conveyance, by which the vendor seeks to impose on the purchaser a liability not mentioned in the particulars or conditions—*e.g.* the obligation to repair a wall: *Hardman v. Child*, 1885, 28 Ch. D. 712.

The words "objections and requisitions" were held not to apply to the objection of the purchaser to the insertion in the conveyance of words restricting the purchaser's enjoyment of the property, when the proposed restriction was not mentioned in the contract and did not appear in the abstract: *Monckton and Gilzean*, 1884, 27 Ch. D. 555. In that case the construction of

the words "objection or requisition" in the condition for rescission was enlarged by the context, see below, p. 362.

It is possible that a requisition involving a question of title may in form be a requisition as to conveyance, in which case it seems wrong to say that, because there is a requisition as to conveyance, the vendor, who could rescind if the purchaser had raised the objection to title directly, could not rescind if the purchaser raises the same objection indirectly by turning his objection into a requisition as to conveyance.

A requisition that certain annuitants shall join in the conveyance is an "objection to the title": *Page v. Adam*, 1841, 4 Beav. 269.

But the words "objection or requisition" (if construed as meaning objections to title) do not cover a demand to have the legal estate got in: *Kitchen v. Palmer*, 1877, 46 L. J. Ch. 511.

The words "objection to title" do not cover a claim by the purchaser for possession, where the vendor, who was not in possession, but could have obtained possession by bringing an action of ejectment, refused to do so on the ground of expense: *Engell v. Fitch*, 1869, L. R. 4 Q. B. 659 (where the contract expressly provided that possession would be given). Possession.

The objection that the vendor has not executed repairs in pursuance of a covenant to repair contained in a lease by the vendor of part of the property, is not an "objection to title": *Sale v. Lambert*, 1874, 43 L. J. Ch. 470 (not reported, as to this part of the case, in the Law Reports). Repairs.

The question whether a claim by the purchaser for compensation will enable the vendor to rescind under the condition for rescission depends partly on the wording of the condition for rescission, partly on the nature of the matter in respect of which compensation is claimed, and partly on the presence or absence of a condition allowing or refusing compensation. Claim for compensation.

If the condition for rescission expressly mentions "requisitions as to compensation, indemnity or otherwise," the purchaser's claim under a condition for compensation is covered by the condition and (in the absence of fraud) entitles the vendor to rescind: *Cordingley v. Cheseborough*, 1862, 4 D. F. & J. 379.

And "compensation" in such a condition, even if the preceding words have been "objections to title, evidence of title, or conveyance," is construed as including not only compensation for defects in title, but compensation for other matters—*e.g.* a deficiency in acreage: *Ibid.*

The words "objections and requisitions to or in respect of the title and of all matters appearing upon the abstract or the particulars or conditions of sale" are wide enough to cover a claim for compensation for a deficiency in acreage, because that is a matter appearing upon the particulars: see *Terry and White*, 1886, 32 Ch. D. 14 (where there was a condition refusing compensation).

The difficulty of deciding whether the claim for compensation is covered by the condition for rescission is most often found where the condition for rescission covers only "objections and requisitions in respect of title," or where it covers "objections and requisitions" simply. In the latter case, the context may influence the construction. Thus, in *Terry and White*, 1886, 32 Ch. D. 14, and *Monckton and Gilzean*, 1884, 27 Ch. D. 555, the condition for rescission mentioned only objections and requisitions, but the preceding condition, binding the purchaser to send in requisitions by a given day, included "requisitions in respect of all matters appearing upon the abstract or the particulars," and these wider words were held to enlarge the meaning of the words "objections and requisitions" in the condition for rescission. Conversely, where a condition for rescission, referring to "objections and requisitions" simply, is made (as it often is) an appendix to a condition binding the purchaser to send in "objections and requisitions to title" by a given date, the words in the condition for rescission will be narrowed in meaning to objections and requisitions *as to title*: see *Kitchen v. Palmer*, 1877, 46 L. J. Ch. 611.

Where the condition for rescission is held to embrace only objections and requisitions *as to title* (whether because the condition expressly refers only to such objections, or because it refers to "objections and requisitions," and these words are construed as meaning objections and requisitions *as to title*), the following rules may be suggested as showing in what cases the purchaser's

claim for compensation will be covered by the condition for rescission :

(1) *Misstatement not involving question of title*

With regard to a misstatement not involving a matter of title, a claim (whether under a condition for compensation or under the general law) for compensation for the misstatement is *not* covered by a condition for rescission so worded as to cover only requisitions as to title.

(2) *Defect in title, but no misstatement*

With regard to a defect in the title in a matter as to which no actual misstatement has been made, a claim (whether under a condition for compensation or under the general law) for compensation on the ground of the defect in the title *is* covered by the condition ; but the vendor cannot rescind under the condition if he knew of the defect or has no title at all.

(3) *Misstatement involving matter of title*

With regard to a misstatement involving a matter of title, (a) if there is no condition for compensation covering the misstatement, or if there is a condition refusing compensation, the condition for rescission, though limited to requisitions as to title, will enable the vendor to rescind except in cases of fraud or where the vendor knew of the defect or has no title at all ; but (b) if there is a condition for compensation covering the misstatement, and it is admitted or proved that the title is defective, and the vendor's statement consequently false, the vendor cannot rescind under the condition for rescission ; (c) if, however, it is not admitted or proved that the title was defective, but the question whether the vendor's statement was false or not depends on a disputed question of title, the condition for rescission will enable the vendor to rescind.

Of the above rules (1) is countenanced by *Painter v. Newby*, 1853, 11 Ha. 26 ; (2) is established by *Ashburner v. Sewell*, (1891) 3 Ch. 405, and *Williams v. Edwards*, 1827, 2 Sim. 78 ; (3) (a) is not supported by any authority, and may perhaps be considered as rendered doubtful by the decision in *Holliwell v. Scacombe*, (1906)

1 Ch. 246, criticised above, p. 356; (3) (b) is established by *Painter v. Newby*, 1853, 11 Ha. 26; whilst (3) (c) cannot with certainty be extracted from the case of *Mawson v. Fletcher*, 1870, 6 Ch. 91, because in that case the condition for rescission was not limited to objections to title. The exceptions of fraud, of defects known to the vendor, and of the vendor having no title at all are dealt with above, pp. 356 to 360.

The words "objection to title" were held not to cover the purchaser's objection that a lease for twenty-one years, not renewable, was described in the particulars as "customary leaseholds renewable every twenty-one years on payment of the customary fine," and the purchaser was held, notwithstanding the condition for rescission, to be entitled, under a condition for compensation for "errors or misstatements," to enforce specific performance with compensation: *Painter v. Newby*, 1853, 11 Ha. 26. See rule (3) (b). But in *Vowles v. Bristol Building Soc.*, 1900, 44 Sol. J. 502, the words "objections or requisitions" were held to cover the purchaser's claim for compensation (under a condition for compensation) for the misdescription "eligible building site," the fact being that a drain ran through the property and made it an inconvenient site for building. Nothing, however, was said in that case as to the construction often put on "objections or requisitions" limiting them to objections to title, nor was *Painter v. Newby* referred to.

The words "objection or requisition in respect of the title" were held to include the purchaser's claim for compensation (under a condition for compensation) for an undisclosed right of way: *Ashburner v. Sewell*, (1891) 3 Ch. 405. See rule (2) above.

The stipulation "if purchaser's counsel shall be of opinion that a marketable title cannot be made by the day fixed for completion, the agreement shall be void," was construed as overriding the condition for compensation, and as enabling the vendor to rescind upon purchaser's counsel advising that an absolute title could only be made out to two-thirds of the property: *Williams v. Edwards*, 1827, 2 Sim. 78. See rule (2).

In *Mawson v. Fletcher*, 1870, 6 Ch. 91, under a condition for rescission "if any objection or requisition is persisted in," the purchaser, who complained that the vendor had described the

property as containing limestone, &c., whereas the abstract showed he had no right to the minerals, was held to be precluded from obtaining compensation under the condition for compensation. The ground of the decision in this case, and the distinction between it and *Painter v. Newby*, would seem to be that, in the latter case, there was no real dispute, but in *Mawson v. Fletcher* the vendor claimed that he could show a title by adverse possession or otherwise, and the objection of the purchaser accordingly amounted to an objection to the title. Mellish, L. J., remarked (p. 93) that if there were a clear case of defect of title to part, the purchaser would be entitled to specific performance with compensation. See rule (3) (c).

There are *dicta* of Lord Romilly in *Hoy v. Smythies*, 1856, 22 Beav. 510, which put the purchaser's rights under the condition for compensation higher than is stated above. In that case the condition for rescission (condition No. 8) was of very wide application, embracing objections and requisitions "as to the vendor's title, the abstract of title, evidence of title, conveyance, or otherwise"; and the condition for compensation included the words, "But this condition shall not limit the vendor's right to rescind the contract under the 8th condition." His Lordship thought (p. 520, *ibid.*) that the condition for rescission did not apply to misdescription covered by the condition for compensation.

(iii) THE VENDOR'S UNWILLINGNESS

The condition is often framed thus: "Objections which the vendor shall be unable, or, on the ground of trouble, expense, or any other reasonable ground, unwilling, to remove." "Unwilling."

But even in the absence of the qualifying words "on any reasonable ground" the effect of the condition for rescission would be the same. The vendor's unwillingness must be a reasonable, not an arbitrary or capricious unwillingness: *Duddell v. Simpson*, 1866, 2 Ch. 102; *Starr-Bowkett and Sibun*, 1889, 42 Ch. D. 375. And the vendor must act in good faith: *Woolcott v. Peggie*, 1889, 15 App. Ca. 42. The vendor is not, however, bound to state to the purchaser why he is unwilling or unable to comply with the requisition: *Glenton to Haden*, 1885, 53 L. T. 434.

The question whether the vendor has acted arbitrarily or capriciously is not to be determined by the form of the vendor's notice for rescission: the question is not whether the form of notice is arbitrary in expression, but whether upon the facts the vendor's conduct has been arbitrary or capricious: *Starr-Boukett and Sibun*, 42 Ch. D. at p. 387. In *Dames and Wood*, 1885, 29 Ch. D. at p. 630, Cotton, L. J., said "the vendor must show some reasonable ground"; but this, as was pointed out by Farwell, J., in *Quinion v. Horne*, (1906) 1 Ch. at p. 603, only means that if the vendor states his reasons, whether in the notice or afterwards in Court, he must show that they rest on a rational foundation.

The condition for rescission does not absolve the vendor from the duty of delivering as perfect an abstract and deducing as good a title (within the limits stipulated for) as he is able to do without incurring unreasonable trouble or expense: *Greaves v. Wilson*, 1858, 25 Beav. 290. But if the original abstract, though showing a defective title, is perfect, and the defect in the title is afterwards modified, it has been thought that the vendor is not bound to deliver a supplemental abstract: *Morley v. Cook*, 1842, 2 Ha. at p. 112. This *dictum* is based on the principle that the delivery of a supplemental abstract would be a waiver by the vendor of his right to rescind (see below, p. 371). On the other hand, it might be argued that, in fairness to the purchaser, the vendor should inform him if the title has been rendered less defective since the delivery of the abstract, in order that the purchaser may withdraw his original requisition.

In one case where the condition was worded "unable or unwilling" the vendor refused, on the ground of expense, to comply with a requisition that he should get in an outstanding legal estate, and it was held that he was bound to comply with the requisition: *Kitchen v. Palmer*, 1877, 46 L. J. Ch. 611. The real ground for this decision would, however, seem to be that the condition did not apply to anything but "objections to title," and this was held to be a matter of conveyance: see above, p. 362.

The vendor's refusal to procure incumbrancers to join in the conveyance to the purchaser is an unreasonable refusal: *Greaves*

Legal
estate.

Incum-
brancers.

v. *Wilson*, 1858, 25 Beav. 290. There the property was sold expressly "free from incumbrances." But even where this is not the case, the general rule is that the purchaser is entitled to have any charges not mentioned in the particulars cleared off out of the purchase money; and the condition for rescission does not entitle the vendor to rescind simply on the ground of unwillingness to pay off such charges: *Jackson and Oakshott*, 1880, 14 Ch. D. 851. If the validity of the charges is *bonâ fide* disputed by the vendor, the case would be different; in *Jackson and Oakshott* the vendor could not very well dispute the existence of the charge, since he had paid it off pending the hearing of the summons. If the incumbrance exceed the purchase money, the vendor will be entitled to rescind under this condition, even though he sell "free from incumbrances": *Great Northern Railway and Sanderson*, 1884, 25 Ch. D. 788. Even if the incumbrance is disputed by the vendor, the evidence on the hearing of the summons may be so strong as to show that the incumbrance is in existence, and this might lead the Court to the conclusion that the vendor's dispute was not *bonâ fide*. At any rate, in *Taylor and Vickery* (Buckley, J., 26 Jan. 1901) it was held that the vendor's power of rescission was not justly exercised in respect of the purchaser's requisition that the conveyance to the vendor's predecessor in title (which was held by a solicitor on behalf partly of a mortgagee who was to be paid off in full and partly of an annuitant whose charge on the property was disputed by the vendor) should be handed over on completion, and the property released from the annuity. Buckley, J., held that as the vendor on his own showing intended to bring trover for the deed after he had got rid of the purchaser, it was not unreasonable that he should bring trover for the deed at once and then complete. Another ground for the decision was that the vendor had in any case to pay the annuity (which was also secured by bond), and therefore his refusal was not *bonâ fide*. The fact that the vendor did not know of the incumbrance when he entered into the contract was held immaterial.

The vendor may refuse to comply with the requisition on the ground that it involves considerable labour and expense, or that

Expense.

it is frivolous, and not taken for the real purpose of clearing the title from substantial objections: *Dames and Wood*, 1885, 29 Ch. D. 630.

A trustee selling under the will of a testator who died in 1858, having devised the property upon trust for A. for life and after her death upon trust for sale and division amongst her children (but if A. died without leaving a child the property was to be conveyed to B. and C. as tenants in common), refused on the ground of expense to supply the address of any child of A., although he knew the address of one child and the addresses of the solicitors who acted for A.'s other children: Held an unreasonable refusal, as the information was reasonably asked for by the purchaser to enable him to ascertain that there was a child alive so that the trust for sale had arisen: *Quinion v. Horne*, (1906) 1 Ch. 596.

The fact that the expense in question is by the contract thrown on the purchaser does not necessarily make it unreasonable for the vendor to rescind under the condition, because the vendor cannot be sure that when the costs are taxed he will recover all the expense from the purchaser: per Cotton, L. J., in *Starr-Bowkett and Sibun*, 1889, 42 Ch. D. at p. 387.

Time of the
essence.

If time is of the essence, the vendor may rescind under the condition for rescission if the purchaser refuses to complete on the day named on the ground that certain requisitions must first be complied with. In such a case the vendor could not be said to be acting arbitrarily or unreasonably.

Thus, where there was a condition binding the purchaser to send in requisitions, &c., "and if from any cause whatever the purchase be not completed by the time before specified, the vendor is then, or at any time afterwards, to be at liberty to annul the contract, &c."; and at the time fixed for completion there were two requisitions, one as to registration and another as to stamping a deed, which the vendor had not yet complied with, but which he was willing to undertake in writing to comply with at his own expense, it was held that on the purchaser's refusal to complete the vendor was entitled to rescind under the condition: *Hudson v. Temple*, 1860, 29 Beav. 536.

(iv) STEPS TO BE TAKEN BY THE VENDOR

In order to obtain the benefit of the condition for rescission, the vendor must either inform the purchaser that he is “unable or unwilling” to comply with the requisition, or must take some steps to rescind. Steps to be taken by the vendor.

The vendor’s notice of rescission must be definite ; a mere statement that “the vendor will be advised to annul” is not a good notice : *Taylor and Vickery*, Buckley, J., 26 Jan. 1901. Cf. *Reynolds v. Nelson*, 1821, 6 Mad. 18, stated above, p. 305.

Under a sale by the Court with a condition enabling the vendor, “with the leave of the Judge, and, notwithstanding any intermediate negotiation, to cancel the contract,” the vendor had not made any application to the Judge to have the contract cancelled, or taken any other steps to rescind. The purchaser on taking out a summons was held entitled to be discharged from his purchase, and to have the deposit returned with the dividends accruing from its investment, and also to be paid his costs, charges, and expenses : *Powell v. Powell*, 1875, 19 Eq. 422.

A condition worded thus, “if the purchaser shall *make* any requisition or *take* any objection,” is construed literally, and the vendor is entitled to rescind under such a condition directly the purchaser sends in any requisitions : *Starr-Bowkett and Sibun*, 1889, 42 Ch. D. 375. The purchaser is entitled to no *locus pœnitentiæ* ; the only condition which the Court adds to the contract is that the vendor’s unwillingness to answer the requisitions must be reasonable : *Ibid.* And a purchaser who has made several requisitions is not entitled to be told in the notice of rescission which of the requisitions the vendor is unable or unwilling to answer : per Fry, L. J., *ibid.* p. 388.

But the condition usually is, “if the purchaser shall *insist* on,” or “*persist in*,” any objection, &c. In such a case the vendor is not entitled to rescind under the condition merely because the purchaser has taken an objection : it is necessary for him to show that the purchaser insisted on the objection : *Duddell v. Simpson*, 1866, 2 Ch. 102. The vendor must answer the objection, even if his answer is a mere refusal to remove the

defect objected to, otherwise the purchaser cannot be said to "insist" on the objection: *Greaves v. Wilson*, 1858, 25 Beav. 290; *Turpin v. Chambers*, 1861, 29 Beav. 104. The vendor need not, however, state to the purchaser his reasons for rescinding: *Glenton to Haden*, 1885, 53 L. T. 434.

A purchaser who repeats the requisition after the vendor has declined to comply with it, "insists" upon the requisition.

Locus pœnitentie.

If the purchaser has insisted on the objection or requisition, it is not necessary for the vendor, on giving notice of rescission, to allow the purchaser any further time to determine whether he will waive his objection: *Duddell v. Simpson*, 1866, 2 Ch. 102. To use the expression of Fry, L. J., in *Dames and Wood*, 1885, 29 Ch. D. 616, no *locus pœnitentie* need be given to the purchaser who has once insisted.

Purchaser withdrawing before vendor's notice.

The purchaser, even though he has insisted on his requisition, may withdraw it at any time before the vendor serves him with notice of rescission. In *Duddell v. Simpson*, 1866, 2 Ch. 102, Cairns, L. J., said (p. 111) that the purchaser's solicitor might have withdrawn his requisition at the moment the notice to rescind was served on him, by saying "My client will waive the objection, and therefore I refuse your tender" of the deposit, "and refuse your notice."

As to the effect of a condition for rescission on a sale by the Court, see below, p. 443.

(v) WAIVER BY THE VENDOR

The vendor may waive his right to rescind under the condition by express agreement, or may lose it through delay, negotiation, or litigation. In the cases in which the vendor has been held to have lost his right to rescind it may be said either that the vendor's conduct is inconsistent with an intention to act upon the condition, and therefore that the vendor has impliedly waived his right, or that it would be unfair for the vendor to rescind after having put the purchaser to unnecessary expense.

The vendor may lose his right to rescind by confirming the contract—*i.e.* making a new contract, or by varying the condition for rescission itself by a parol agreement, as in *Dawson v. Yates*, 1839, 1 Beav. 301.

Express waiver.

He may lose his right by unreasonable delay, by continuing Delay.
to treat long after the defect in title is made known to him, and the purchaser has insisted on his requisition : *Bowman v. Hyland*, 1878, 8 Ch. D. 588. The test of unreasonableness is, " Was the delay so great as to lead the Court to the conclusion that the vendor had determined his option to rescind by resolving to go on with the contract ? " : *Gray v. Fowler*, 1873, L. R. 8 Ex. at p. 281. There a delay of nearly five months was, under the special circumstances, held not unreasonable. Where time is not of the essence, the vendor need not give notice of rescission before the time fixed for completion : *St. Leonard's, Shore-ditch v. Hughes*, 1864, 17 C. B. N.S. 137.

If the condition does not expressly enable the vendor to Condition not
rescind notwithstanding intermediate negotiations, the vendor referring to
may by negotiating lose his right to rescind. It has even been negotiation.
held that the vendor, by informing the purchaser that he should have no difficulty in answering the objections, loses his right to rescind on the ground of unwillingness : *Tanner v. Smith*, 1840, 10 Sim. 410. But a vendor does not waive his right to rescind through merely answering the requisitions, as it is necessary for the vendor to answer in order to see if the purchaser insists : *Duddell v. Simpson*, 1866, 2 Ch. 102.

An answer " without prejudice " would probably not amount to waiver : per Wigram, V.-C., in *Morley v. Cook*, 1842, 2 Ha. at p. 115.

The condition enabling the vendor, in case of objection, to " rescind and return the purchaser's deposit without interest," does not entitle the vendor to retain the deposit as long as he pleases, making fruitless efforts to remove the purchaser's objection : *M'Culloch v. Gregory*, 1855, 1 K. & J. 286.

A condition which expressly empowers the vendor to rescind Condition
" notwithstanding any negotiation or attempt to comply with referring to
the requisition " is effectual in entitling the vendor to rescind negotiation.
after attempting to comply with the requisition : *Deighton and Harris*, (1898) 1 Ch. 458. But the condition does not entitle the vendor, who has elected to insist upon specific performance, afterwards to change his mind and rescind : *Ibid.* p. 464, referring to *Gardom v. Lee*, 1865, 3 H. & C. 651.

Condition not
referring to
litigation.

If the condition does not contain the words "notwithstanding any pending litigation," the vendor, by bringing an action for specific performance, loses his right to rescind in respect of requisitions made before the action, but does not thereby lose his right to rescind in respect of other requisitions : *Gray v. Fowler*, 1873, L. R. 8 Ex. 249. He cannot, of course, rescind unless he first procures the dismissal of his action : *Warde v. Dixon*, 1859, 28 L. J. Ch. 315, 322. There it was said the vendor must procure its dismissal with costs ; but in *Gray v. Fowler* the vendor was allowed to rescind, on having his action dismissed without costs, probably because the objection to the title, in respect of which the vendor rescinded, was one raised by the purchaser for the first time in his defence to the vendor's action for specific performance. It would appear that even if the words "notwithstanding any litigation" are not inserted in the condition, the vendor may rescind under the condition, although the purchaser has begun an action for specific performance, provided the vendor's notice to rescind is given on the day on which the action is begun : *Hoy v. Smithies*, 1856, 22 Beav. 510. And where the purchaser's writ claiming rescission was issued on the 30th of November, and sent to the vendor's solicitor for the purpose of service being accepted, and on the 3rd of December the vendor served a notice to rescind under the condition, the vendor was held not to be too late : *Isaacs v. Towell*, (1898) 2 Ch. 285. In order to preclude the vendor's right to rescind, actual waiver of his right, by acquiescence in the litigation, is necessary : *Ibid.*

Condition
referring to
litigation.

If the condition contains the words "notwithstanding litigation," and the vendor rescinds after the purchaser has begun an action for specific performance, then, if the purchaser goes on with his action after the vendor has given notice of rescission, the action will be dismissed, notwithstanding that the purchaser may, in the pleadings, have waived his right to insist on the requisition, and the action will be dismissed with costs from the time when the notice to rescind was received by the purchaser : *Duddell v. Simpson*, 1866, 2 Ch. 102.

The words "notwithstanding any litigation" do not enable the vendor to rescind under the condition, if the vendor's

rescission is made after the purchaser has brought an action for the recovery of the deposit, and after the vendor has put in his defence, the vendor having till then resisted a valid objection to his title and claimed to retain the deposit on the ground of the purchaser's default : *Best v. Hamand*, 1879, 12 Ch. D. at p. 6, judgment of Hall, V.-C. The decision was reversed on the ground that the purchaser's objection to the title was precluded by the conditions.

The words "notwithstanding litigation" do not enable the vendor to rescind under the condition after judgment has been given against him on the point in dispute : *Arbib and Class*, (1891) 1 Ch. 601. Judgment.

Even though the vendor may be entitled to rescind after the commencement of litigation, the condition may not be sufficient to oust the jurisdiction of the Court to order him to pay the costs of the litigation. Thus, where the purchaser took out his summons on the 24th of July, 1900, and evidence was filed on both sides, and it was not till the 12th of March, 1901, when the summons was in the paper for hearing, that the vendor rescinded under the condition, the Court ordered the vendor to pay the costs of the litigation, although the condition empowered the vendor, notwithstanding litigation, to rescind and to return the deposit, "but without any interest costs of investigating the title or other compensation or payment whatever" : *Spindler and Mear*, (1901) 1 Ch. 908. See also what was done in *Duddell v. Simpson*, 1866, 2 Ch. 102. Costs.

(vi) VENDOR RESCINDING AND AFTERWARDS WISHING
TO COMPLETE

If the vendor has rescinded under the condition, he cannot afterwards compel the purchaser to complete : *Smith v. Wallace*, (1895) 1 Ch. 385. There, notice by the vendor that he was unwilling to comply with the purchaser's requisitions and calling upon him to withdraw them, followed by a reply from the purchaser refusing to withdraw, coupled with a long intentional delay on the vendor's part during which the vendor was trying to re-sell the property, was held to have put it out of the vendor's power to enforce specific performance. In such a

case, though the formal notice of rescission has not been served, the vendor is treated as if he had rescinded. *Smith v. Wallace* was an action by the purchaser claiming the deposit and expenses, the vendor counterclaiming for specific performance; the Court ordered the deposit to be returned with interest, but made no order for the payment by the vendor of the purchaser's expenses.

(vii) UNUSUAL FORMS OF CONDITION FOR RESCISSION

"Void."

If on the sale of property described as copyhold there is a stipulation "if it should appear that any part is freehold, then this agreement to be void," specific performance will not be enforced at the instance of the purchaser if the vendor can show that part is freehold: *semble*, *Daniels v. Davison*, 1811, 16 Ves. 249, 255. A proviso that "in case the vendor cannot deduce a good title, or if the purchaser shall not pay the money at the appointed day, the agreement shall be utterly void," will be construed as giving the purchaser, in the first case, and the vendor, in the second case, the right to rescind the contract, but not *vice versâ*: *Roberts v. Wyatt*, 1810, 2 Taunt. at p. 277. The case of *Williams v. Edwards*, 1827, 2 Sim. 78, stated above, p. 364, also illustrates the construction of the words "the agreement shall be void."

A condition empowering the *purchaser* to vacate the sale in case his objections were not removed was held to entitle him to rescind on the failure of the vendor to comply with a requisition that the vendor should show a title to a certain small portion of the property, the requisition being in substance an "objection": *Ashton v. Wood*, 1857, 3 Jur. N. S. 1164.

"Dispute as to title."

Where the stipulation was, "if any dispute shall arise as to the title, the same shall be submitted to some eminent conveyancer, and in case he shall be of opinion that a good title cannot be made out, then power to vendor to rescind," and there was a prior life estate subsisting in the property, of which the vendor was aware at the date of the contract, it was held that the purchaser's requisition as to the life estate was not such a "dispute" as to come within this stipulation, and entitle the vendor to rescind: *Nelthorpe v. Holgate*, 1844, 1 Coll. 203.

A condition that “if either party refuse to perform the agree- “Refuse.
ment on his part, he shall pay to the other of them who shall
be willing to complete, the sum of 100*l*.” was held to entitle the
purchaser, who had refused to complete on the ground that the
vendor’s title was defective, to recover 100*l*. from the vendor
because the vendor was really refusing to complete and the
purchaser was willing to complete if the vendor’s title was good :
Reeve v. Berridge, 1888, 20 Q. B. D. 378.

(viii) PROCEDURE

The question whether the vendor has validly exercised the
power of rescission given him by the conditions of sale, may be
tried on a summons under the Vendor and Purchaser Act, 1874.
It is not “a question affecting the existence or validity of the
contract” within the meaning of sect. 9 of the Act, those words
referring only to the inception of the contract : *Jackson and
Woodburn*, 1887, 37 Ch. D. 44.

CHAPTER XXV

THE CONVEYANCE

	PAGE
(i) Preparation and Expense of Conveyance	376
(ii) Form of Conveyance	377
(iii) Parties	378
(iv) Recitals	381
(v) Consideration	381
(vi) Parcels	382
(vii) <i>Habendum</i>	383
(viii) Covenants for Title	384
(ix) Other covenants by the Vendor	389
(x) Covenants by the Purchaser	390
(xi) Time for delivery of Draft	396
(xii) Execution	397
(xiii) Transfer of Public-house Licence	397
(xiv) Landlord's licence to assignment of Leaseholds	398

(i) PREPARATION AND EXPENSE OF CONVEYANCE

Preparation
of convey-
ance.

IN the absence of stipulation, the purchaser is entitled on pay-
ment of his purchase money, and any interest payable (and
any money payable for timber, fixtures, &c.), to have a con-
veyance of the property sold, and the vendor is entitled to insist
on the purchaser taking a conveyance : *Re Cary-Elwes*, (1906)
2 Ch. at p. 149.

In the absence of stipulation the purchaser prepares the
conveyance at his own expense (*Poole v. Hill*, 1840, 6 M. & W.
835), and the vendor peruses and executes it at his own expense.
See further as to expense, p. 411.

As to the effect of a condition for a "free conveyance" on
the purchaser's right to an abstract, see p. 263.

The purchaser is not entitled himself to prepare the deeds
getting in incumbrances which are to be paid off out of the
purchase money. He should require the vendor to prepare the
deeds, and to submit the engrossment (*q.v.* an abstract or copy

of the proposed draft) to the purchaser for approval : *Jones v. Lewis*, 1847, 1 De G. & Sm. 245.

(ii) FORM OF CONVEYANCE

The purchaser is entitled to frame his conveyance as he pleases, provided he does not depart from the contract, and does not throw on the vendor a greater burden than the contract contemplates : per Kekewich, J., in *School Board for London and Foster*, 1903, 87 L. T. 700. Form of conveyance.

The vendor is not entitled to raise objections to the form of the conveyance, unless it involves a matter of substance affecting the vendor, or entails extra expense upon him (per Page-Wood, V.-C., in *Cooper v. Cartwright*, 1860, John. 679), or requires him to state what is not true ; see below, p. 381.

Where a mortgagor contracts to sell the fee simple “ free from incumbrances,” and the purchaser afterwards agrees with the mortgagee to keep the mortgage on foot, the purchaser may insist on having a conveyance of the equity of redemption, instead of a conveyance of the fee free from the mortgage, provided the vendor is discharged from all liability under the mortgage, and is not put to any extra expense : *Cooper v. Cartwright*, *ubi sup.* Keeping mortgage on foot.

A mortgagee, who had foreclosed, contracted to sell, and by mistake inserted in the contract a condition that “ as the vendor was a mortgagee with power of sale, she would only enter into the usual covenant that she had not incumbered.” The purchaser objected to the validity of the foreclosure decree, and insisted on having a conveyance under the power of sale. The Court refused to compel the vendor to sell under the power of sale, as this would have opened the foreclosure : *Watson v. Marston*, 1853, 4 D. M. & G. 230. Mortgagee who has foreclosed.

If a purchaser desires to have the property conveyed to him in parcels, by separate conveyances, the vendor cannot object to execute the separate conveyances, provided the whole purchase money is paid at once, and the conveyances are all tendered for execution at the same time, and the purchaser bears the additional expense : per Jessel, M. R., in *Egmont v. Smith*, 1877, 6 Ch. D. 469, 471. See further, as to conveyance of two lots, p. 429, below, Separate conveyances.

On the sale of a freehold property, and a judgment recovered against former purchasers who had abandoned their contract, the purchaser was held to be entitled to insist on separate conveyances of the freehold and the judgment, although the Court could see no reason for the conveyances being separate, as it would be impossible to keep the names of the abandoning purchasers off the title : *Clark v. May*, 1852, 16 Beav. 273.

The analogy of the foregoing cases suggests the rule that the purchaser, if he bears the additional expense, may require the vendor to get in outstanding estates and incumbrances by separate deeds.

But an intending lessee was not allowed to insist on the lessor obtaining a release by a separate deed of an equitable interest vested in a third person whom the vendor proposed to make a party to the lease, as his concurrence in the lease was sufficient : *Reeves v. Gill*, 1838, 1 Beav. 375.

Procedure.

A question as to the form of the conveyance may (and should) be decided on a vendor and purchaser summons, even though evidence is adduced tending to throw doubt on the validity or existence of the contract : *Hughes and Ashley*, (1900) 2 Ch. 595. All that the Court decides on a summons is that, if there is to be a conveyance, it should be in such and such a form. In *Lander and Bagley*, (1892) 3 Ch. 41, the Court decided what were proper covenants in the case of an agreement to grant a lease, although it was suggested that the agreement was not one which the Court would specifically enforce. See, too, *Wallis and Barnard*, (1899) 2 Ch. 515.

Where the conditions provide that the form of the conveyance shall, in case of dispute, be settled by the Judge, an appeal lies from the order of the Judge settling the form of the conveyance : *Pollock v. Rabbits*, 1882, 21 Ch. D. 466.

(iii) PARTIES

Grantees.

The vendor is bound to convey to any proper nominee of the purchaser. But where the vendors are trustees for sale, the purchaser cannot re-sell to one of them and compel the vendors to convey to that person as the purchaser's nominee, at any rate, if he declines the nomination : *Delves v. Gray*, (1902) 2 Ch. 606.

The vendor cannot be compelled to procure the concurrence of Grantors. unnecessary parties.

For instance, a mortgagee selling under a power of sale validly exercised, cannot be required to obtain the concurrence of the mortgagor, even though the mortgagor covenanted in the mortgage deed to join in any sale by the mortgagee : *Corder v. Morgan*, 1811, 18 Ves. 344. Such a covenant is a mere contract between the mortgagor and the mortgagee, to the benefit of which the purchaser is not entitled.

A vendor of copyholds who had both the legal estate and the beneficial interest, was held bound to procure a release from persons who, under the voluntary settlement of a predecessor in title of the vendor, had the right to be admitted, and on admission would be trustees for the vendor : *Steele v. Waller*, 1860, 28 Beav. 466.

Cestuis que trust need not be made parties if the trustees can give a good discharge for the purchase money (*Binks v. Rokeby*, 1818, 2 Sw. 222), except for the purpose of covenanting for title, where the contract does not restrict the purchaser's right to have the ordinary covenants, or of covenanting to produce title deeds, where the contract is that they shall so covenant. See *Re London Bridge Acts*, 1842, 13 Sim. 176.

On the sale of a bankrupt's estate, the trustee in bankruptcy would probably not be compelled to procure the bankrupt's concurrence, unless for some special reason the bankrupt's concurrence were necessary.

If the purchaser insists on the concurrence of persons who are abroad or cannot be found, and whose concurrence, though necessary technically to complete the title, is not practically necessary, the Court may, in a decree for specific performance in an action brought by the vendor, make an order vesting the estate of such persons in the purchaser, and will probably leave the purchaser to pay his own costs, on the ground of the objection being frivolous. This course was pursued in *Collard v. Roe*, 1859, 4 De G. & J. 525, where the purchaser required the concurrence of a dower trustee, who was in Australia.

If the vendor contracts to procure the concurrence of third persons in the conveyance, he will not be allowed afterwards to

Condition as to concurrence of third parties.

refuse to procure their concurrence on the ground that they are not necessary parties : *Benson v. Lamb*, 1846, 9 Beav. 502.

The condition " the vendor is a trustee for sale, and his receipt shall be deemed an effectual and conclusive discharge for the purchase money, and the purchaser shall not be entitled to require the concurrence of the *cestuis que trust*," is sufficient to inform the purchaser that the vendor had not the usual power to give receipts, and will preclude the purchaser from requiring the receipt of the *cestuis que trust* : *Wilkinson v. Hartley*, 1852, 15 Beav. 183.

A condition stated the circumstances under which N. (a life tenant whose consent to the sale by the vendors, trustees of the settlement, was necessary) had himself been the vendor to the trustees, and provided that no objection should be made to the title on account of those circumstances, and that the concurrence of N. and of any persons beneficially interested under the settlement should not be required, but that the written consent of N. to the sale would be handed to the purchaser on completion. It appeared that N. had incumbered his life estate, and was a bankrupt. It was held that the condition did not preclude the purchaser from requiring the concurrence of the incumbrancers and the trustee in bankruptcy : *Bedingfield and Herring*, (1893) 2 Ch. 332.

On a sale purporting to be " by order of the executors," a condition, that the concurrence of the *cestuis que trust* should not be required, was held insufficient, the fact being that the sale was not by the executors, but by an administrator *durante absentia* of the next of kin : *Webb v. Kirby*, 1856, 7 D. M. & G. 376, 382.

A condition that the purchaser of each lot should be a party to the assignments to the purchasers of the other lots does not render the purchaser of one lot a necessary party to an action by the vendor for specific performance against the purchaser of another lot : *Paterson v. Long*, 1842, 5 Beav. 186.

As to the effect of a condition precluding the concurrence of other parties on the purchaser's right to object to the title as defective : see above, p. 223.

(iv) RECITALS

The vendor is entitled to refuse to execute a conveyance containing untrue recitals : *Manning v. Bailey*, 1848, 2 Ex. 45. See, too, *Hartley v. Burton*, 1868, 3 Ch. 365 (a case of a mortgagee asked to execute a deed of re-conveyance). Thus, on an agreement to sell a leasehold messuage and the fixtures belonging to the vendor, the purchaser is not entitled to insert in the conveyance a recital of an agreement to purchase the messuage and the fixtures "belonging thereto," as this might include fixtures not belonging to the vendor and not contracted to be sold : *Manning v. Bailey*, *ubi sup.* But it would seem that under the general rule, stated above, p. 377, the purchaser may insert what recitals he pleases, unless they are untrue or affect the vendor prejudicially. Also it is conceived that the vendor cannot object to the recitals on the ground that he does not know whether they are true or not ; for instance, if a leaseholder purchasing the freehold reversion tendered a conveyance reciting that the lease was vested in him, the vendor could not object that he did not know whether the recital was true. The purchaser can, if he choose, have no recitals at all : compare *Hartley v. Burton*, *ubi sup.*

(v) CONSIDERATION

The vendor may validly object to execute a conveyance which does not truly state the consideration. Thus, on an agreement for the sale of the fixtures for 150*l.* and the grant of a lease at a specified rent, the vendor may refuse to execute a lease purporting to be made in consideration of the payment of 150*l.*, and of the yearly rent, covenants, &c : *Vonhollen v. Knowles*, 1844, 12 M. & W. 602.

Where two sets of mortgagees entitled to the mortgage debt in unequal shares joined in selling, the purchaser was held bound to accept a conveyance containing a receipt clause expressing the whole purchase money as being paid to all the vendors jointly, and was not allowed to require the money to be apportioned between the two sets of vendors : *Parker and Beech*, 1886, 54 L. T. 750 (on app. 56 L. T. 95).

(vi) PARCELS

Parcels

If the parcels cannot be described with sufficient accuracy and distinctness without a plan, the purchaser is entitled to annex a plan to the conveyance and to put a reference to the plan in the parcels, and the vendor is not entitled to limit the reference to the plan by such words as "by way of elucidation and not by way of warranty": *Sparrow and James*, Farwell, J., May 1, 1902.

If the purchaser has bought at so much an acre, he cannot insist on having a conveyance *usque ad medium filum viæ* (or *aquæ*) without paying for the half road (or river or dyke) at the acreage price: *Popple and Barratt*, 1877, 25 W. R. 248.

A purchaser is not entitled to insert a grant of easements "enjoyed" with the land where such words, if inserted, would give the purchaser a right of way over adjacent land of the vendor such as the purchaser is not entitled to have by virtue of the contract: *Bolton v. Bolton*, 1879, 11 Ch. D. 968. And since the Conveyancing Act, 1881, the vendor is entitled to insert words limiting the general words implied by sect. 6 of that Act if the words so implied would give the purchaser more extensive rights than he is entitled to under the contract: *Peck and London School Board*, (1893) 2 Ch. 315; *Hughes and Ashley*, (1900) 2 Ch. 595. A contract to purchase a piece of land "with the appurtenances" does not give the purchaser a right to a way of convenience (as distinct from a way of necessity) over adjoining land of the vendor: *Bolton v. Bolton*, and *Peck and London School Board*, *ubi sup.*

In a conveyance of land together with the benefit of certain restrictive covenants the vendor may not insert words restricting the conveyance by stating that he does not warrant that the covenants can be enforced by his assigns: *Bennett v. Stone*, (1902) 1 Ch. at p. 227; (1903) 1 Ch. at p. 522.

Where on a sale in lots the contract entitles the vendor to reserve an easement over lot 2 corresponding to the user of the then tenant of lot 1 (as where a condition stated "Lot 2 is sold subject to the right of the vendors and their successors in title, the owners of lot 1 to exercise and enjoy the rights of

way which are now exercised and enjoyed by the tenant of lot 1”), the purchaser is not entitled to have the extent of the tenant’s user defined by the vendor; the conveyance must follow the terms of the condition, the language of the condition only being altered, if the purchaser desires it, so as to define the place from which and the place to which, and whether the right of way is a footway only or also a way for carts and vehicles: *Tavistock Brewery Co. v. Gilbert*, Byrne, J., March 8, 1900.

See further as to easements the next sub-heading and p. 425, below.

(vii) HABENDUM

On a sale by the Court of property subject to several mortgages, the following conditions were employed: “The first mortgagee will join in the conveyance and will release the property,” and “the purchaser shall not require the concurrence of any person having only an equitable interest bound by the order for sale.” The first mortgagees required the insertion in their grant to the purchaser of the words “according to their estate and interest in the premises and not further or otherwise”; and in the *habendum* “subject to such right or equity of redemption (if any) as is subsisting in the premises and is not by these presents conveyed or released.” It was held that the purchaser was as against the vendor entitled to an absolute conveyance in fee simple without any qualifying words: *Mostyn v. Mostyn*, (1893) 3 Ch. 376. The reason given in that case, that the puisne incumbrancers were bound by the order of the Court under sect. 70 of the Conveyancing Act, has been questioned in *Jones v. Barnett*, (1900) 1 Ch. 370, but the decision itself has not been questioned.

If the conditions require the purchaser to assume that the term which was being sold, a term of ninety-nine years, was assigned by a certain deed, the vendor cannot refuse to convey the whole term on the ground that (as the fact was) only a sub-term of ninety-nine years less one day had passed by that deed: per Eady, J., in *Scott and Eave*, 1902, 86 L. T. 617.

The vendor is not entitled to insist on conveying subject to certain restrictive covenants which are not mentioned in the contract. The purchaser may by notice take subject in equity

to these restrictions, but he is entitled to refuse the insertion in the conveyance of a reference to the restrictions: *Wallis and Barnard*, (1899) 2 Ch. 515. If, however, the purchaser were insisting on completion the Court would not decree specific performance against the vendor unless the purchaser agreed to the insertion: *semble, ibid.* p. 521. See further below, p. 391.

The vendor is not entitled to insert in the conveyance the words "subject to the several covenants and conditions, restrictions and agreements contained in an indenture dated, &c.," even though the land is subject to such covenants, unless he informs the purchaser what the covenants are: *Monckton and Gilzean*, 1884, 27 Ch. D. 555.

A condition that "the property is sold, and will be conveyed subject to all quit-rents, &c., and easements, if any, without any obligation on the vendors to define any such rights or claims," is sufficient to enable the vendor to insist on the insertion of a saving in general terms in the *habendum* of the conveyance, although he does not allege that there are any quit-rents or easements: *Gale v. Squier*, 1877, 5 Ch. D. 625 (a sale by trustees).

(viii) COVENANTS FOR TITLE

Covenants for title. (a) *Who must covenant*; (b) *What covenants may be required*; (c) *The extent of the covenants.*

(a) *Who must covenant*

(a) *Who must covenant.* Except upon a sale by the Crown, or the Official Receiver, or the Official Trustee of Charity Lands, every vendor must, in the absence of stipulation, covenant for title.

Cestuis que trust. On a sale by trustees, in the absence of stipulation, the purchaser is entitled to covenants for title from beneficiaries who take a substantial interest: *Re London Bridge Acts*, 1842, 13 Sim. 176. As to the extent of such covenants, see below, p. 387. On a sale by the Court, the beneficiaries do not covenant: *Cottrell v. Cottrell*, 1866, 2 Eq. 330.

Life tenant. Where the Court directed a sale of a term, and the trustees, instead of acting under this order, sold the fee with the permission of the Court under a power of sale in a settlement

which empowered them to sell by the direction of the tenant for life, the tenant for life under the settlement had to give covenants for title : *Poulett v. Hood*, 1868, 5 Eq. 115.

On a sale by trustees, the trusts being for A. for life with power for the trustees to sell upon A.'s request in writing, the usual condition that "the vendors being trustees shall be required to give only the statutory covenant against incumbrances implied by reason of their being expressed to convey as trustees," does not preclude the purchaser from requiring a covenant for title from A., the equitable tenant for life : *Sawyer and Baring*, 1884, 53 L. J. Ch. 1104.

If a trustee, after contracting to grant a lease containing a covenant by him for quiet enjoyment, becomes of unsound mind, the Court may, under the Trustee Act, 1850, vest a legal term in the lessee, but cannot enable any person to covenant on behalf of the lunatic trustee, so as to bind the lunatic trustee's estate, and the lessee cannot be compelled to complete : *Cowper v. Harmer*, (1887) W. N. 186.

Trustee afterwards lunatic.

The Court may, under the Lunacy Act, 1890, s. 124, authorise the committee of a lunatic to covenant for title in the usual way : *Re Ray*, (1896) 1 Ch. 468.

(b) *What covenants may be required*

(b) What covenants
Conveyancing
Act, 1881,
s. 7.

Certain covenants for title are implied by virtue of the Conveyancing Act, 1881, s. 7, in conveyances in which the vendor conveys and is expressed to convey as "beneficial owner," &c. It is conceived that in the absence of stipulation the purchaser is entitled (but see sect. 66) at his option to require the vendor to convey "as beneficial owner," or "as trustee" (or as the case may be), or to have the proper covenants for title set out at length, in the latter case paying any increased expense caused to the vendor by the additional length of the conveyance. In cases where the purchaser is entitled to have full covenants for title, but the vendor is not beneficial owner, it would seem to be proper to set out the covenants in full and not to make the vendor convey "as beneficial owner": in such cases the purchaser would not (it is conceived) have to bear any expense caused to the vendor by the increased length of the conveyance.

Seisin.

Where the purchaser is entitled to full covenants for title, a covenant that the vendor is seised in fee used to be one of the covenants which the purchaser might require. See note to *Church v. Brown*, 1808, 15 Ves. at p. 263. But this covenant was usually omitted: see 9 Jarman's Conveyancing (3rd ed. 1844), pp. 75 and 165, and 1 Dav. (4th ed. 1874), p. 203. The Conveyancing Act, 1881, s. 7 (A), does not include such a covenant in the list of the covenants implied when the vendor conveys "as beneficial owner." If the Conveyancing Act, 1881, s. 7, is, as seems probable, held to be evidence of what are the usual covenants, such a covenant could not now be required. It is doubtful whether such a covenant has any effect beyond that of the covenant for right to convey. If a covenant has the force of an averment so as to operate as an estoppel (which is doubtful), then the advantage of the covenant as to seisin would be that it contains a precise averment operating by way of estoppel so as to convey the legal estate; while the covenant for right to convey is not sufficiently precise, being consistent with the vendor not having the legal estate: see *Heath v. Crealock*, 1874, 10 Ch. 30, and *General Finance, &c. v. Liberator*, 1878, 10 Ch. D. 15.

Full covenants.

In the absence of stipulation or notice the purchaser has a right to expect full covenants for title. Where the vendor is the beneficial owner he can be compelled to convey "as beneficial owner," or give full covenants.

Where the vendor is a trustee or mortgagee, but the purchaser contracted without knowing or having notice of this fact, he will probably be entitled to refuse to complete unless he gets full covenants for title; and it is not perfectly clear that mere notice of the fact that a vendor is a trustee is sufficient, without an express stipulation as to the covenants to be given (see *West v. Wild*, 1824, 3 L. J. o.s. Ch. 15), though it is conceived that the purchaser's knowledge or notice would be taken to be sufficient in such a case. Probably in no case (whether notice was given or not) could the purchaser insist on completion, compelling the trustee or mortgagee to give full covenants.

Death of vendor.

If a vendor who was beneficial owner dies before completion, his personal representatives or devisees in trust cannot be

compelled to give full covenants. Even if the vendor had expressly agreed to enter into certain covenants for title, his legal personal representatives or devisees in trust cannot be forced to enter into such covenants personally : see *Worley v. Frampton*, 1846, 5 Ha. 560 (a case of a covenant for the renewal of a lease). But it is not clear that they could enforce the contract unless they gave the purchaser the covenants agreed upon.

(c) *The extent of the covenants*

Where the vendor conveys “as beneficial owner,” the covenants for title implied by the Conveyancing Act, 1881, are, in the case of a vendor who was himself a purchaser for value (in which expression a person deriving title under a marriage settlement is not included), limited to his own acts, deeds, and omissions, and, in the case of a vendor who was not a purchaser for value, to his own acts, deeds, and omissions, and those of any one through whom he derives title : sect. 7 (A) and (B). Where the vendor conveys “as trustee,” or “as mortgagee,” the implied covenant extends to his own acts only : sect. 7 (F).

(c) Extent of covenants. Conveyancing Act, 1881, s. 7.

Where the vendor is not a purchaser for value, there is some difficulty in deciding how far his covenants should extend.

Vendor not a purchaser for value.

Before the Conveyancing Act, 1881, the view of conveyancers seems to have been, that the purchaser might require a vendor, who was not a purchaser for value, to covenant against “the acts of all persons interested in the estate, since the last purchase on which the ordinary covenants for title were entered into, it being understood that a purchaser is entitled to a complete chain of covenants for title” : Davidson (ed. 1855), Vol. I. p. 196. Lord St. Leonards also states that, “the universal and settled practice of conveyancers is to extend covenants for the title to the acts of the last purchaser” : Sug. 574. But he refers to reported cases, as showing that a different view was held by the Court of Chancery. In *Loyd v. Griffith*, 1745, 3 Atk. 264, it was held that the vendor’s covenant should extend only to his immediate ancestor or deviser, on the ground that “it would be unreasonable to extend it to the first purchaser, where a

family have been for several generations in possession of the estate, for they may have had the benefit of the Statute of Limitations and other laws in their favour." In *Wakeman v. Duchess of Rutland*, 1796, 3 Ves. 233, it was held that the covenant of a vendor who was not a purchaser for value need extend only to "the acts of his grantor, ancestor, devisor, or settlor, and those claiming through such grantor, &c.," and it was said (p. 236) that in a sale by the Court there is never a "covenant warranting the title; the covenants in conveyances under sales by the Court are, as in every other conveyance, only against his own acts and those of the person immediately preceding him." In the note to *Church v. Brown*, 1808, 15 Ves. at p. 263, the point is left doubtful. In *Pickett v. Loggon*, 1807, 14 Ves. 215, it was said that the usual course, where the vendor has taken by descent, is for him to covenant "against the acts of his ancestor."

Effect of Con-
veyancing
Act, 1881,
s. 7.

The Conveyancing Act, 1881, coupled with the fact that the phrases "as beneficial owner," &c., have been generally adopted by conveyancers, settles this doubt in favour of the view held by Mr. Davidson and Lord St. Leonards; but raises a fresh doubt, viz. whether the covenant implied by statute does not extend beyond the last purchaser for value, so as to embrace every predecessor in title other than a purchaser for value, notwithstanding the fact that the chain of descent and voluntary alienation has been broken by a purchase for value. The doubt would probably be answered in the negative, on the ground that the derivation of title from such earlier predecessors in title, in addition to being by descent, devise, or voluntary alienation, is also by purchase for value, as, but for the subsequent purchase for value, the land would not have become the property of the vendor.

Life tenant.

A tenant for life is not bound to covenant absolutely except to the extent of his life estate; his covenants for title as respects the reversion should be limited to the acts, deeds, and defaults of himself and his heirs and the persons claiming under or in trust for him, them, or any of them: Dart, p. 571.

Registered
land.

With regard to registered land, "in the absence of special stipulation, a vendor of land registered with an absolute title

shall not be required to enter into any covenant for title ; and a vendor of land registered with a possessory or qualified title shall only be required to covenant against estates and interests excluded from the effect of registration, and the implied covenants under sect. 7 of the Conveyancing and Law of Property Act, 1881, shall be construed accordingly " : Land Transfer Act, 1897, s. 16 (3).

(ix) OTHER COVENANTS BY THE VENDOR

Where the vendor dies before completion, his personal representatives or devisees in trust cannot (at all events, if they take no beneficial interest) be compelled to enter into the covenants which he would have had to enter into had he lived to complete : *Worley v. Frampton*, 1846, 5 Ha. 560. If, for instance, there is a condition that the conveyance shall contain a covenant by the vendor for himself, his heirs, and assigns, against building on adjacent land, and the vendor dies before completion, his representatives cannot be compelled to covenant. But, it is conceived, the purchaser could require the insertion in the conveyance of a recital of the contract, and, in the operative part, of words giving the purchaser the benefit of the stipulations restricting building, but so as not to render the conveying parties personally liable in damages.

Restrictive
covenants.

As to the covenants in the conveyance where leaseholds are sold in lots, see below, p. 426.

In the case of a lease with perpetual covenant for renewal, when the reversion vests in trustees, the latter can be made to renew but not to covenant to renew : *Copper Mining Co. v. Beach*, 1823, 13 Beav. 478 ; *Hodges v. Blagrove*, 1854, 18 Beav. 404. But if the trustees are also beneficiaries, they may be made to covenant : see *Hare v. Burges*, 1857, 4 K. & J. 45. And if the trustees insist on the performance of the contract to take a lease, they must covenant : see *Worley v. Frampton*, 1846, 5 Ha. 560. It would seem that the lessee is entitled to a lease containing a recital of the original lease and covenant to renew : *Copper Mining Co. v. Beach*, *ubi sup.* In *Hodges v. Blagrove*, *ubi sup.*, it seems to have been thought necessary to have an order of the Court.

Renewable
leaseholds.

Leaseholds
sold in lots.

On a sale of leaseholds in lots by way of under-lease, the purchaser of any lot may require the vendor to covenant to pay the rent reserved by the original lease, and to perform all the covenants therein contained which affect the residue of the property : *Browne v. Paull*, 1856, 26 L. T. o.s. 232. Executors selling leaseholds in lots by way of under-lease cannot, in the absence of stipulation, compel the purchaser to complete unless they give an indemnity against the purchaser's liability in respect of the whole rent reserved by the original lease, and the breach of any of the covenants in that lease : *West v. Wild*, 1824, 3 L. J. o.s. Ch. 15. The mere statement in the conditions that the vendors are executors is not sufficient to absolve them from this duty : *Ibid.* In that case the executors were the original lessees, but the decision would probably have been the same had the lease devolved on them as executors ; for executors are bound when they come forward as vendors to make as good a title as other vendors : *Ibid.* p. 17.

Covenants by
purchaser.
Sale of equity
of redemption.

(x) COVENANTS BY THE PURCHASER

On the sale of an equity of redemption the vendor may, even in the absence of stipulation, require the purchaser to covenant to pay the mortgage debt and future interest : *Bridgman v. Daw*, 1892, 40 W. R. 253. But even if the purchaser does not enter into such a covenant, the Court would, after completion, compel him to indemnify the vendor against the mortgage : per Lord Eldon, in *Waring v. Ward*, 1802, 7 Ves. 332, 337.

Partnership.

So, too, the purchaser of a share in a partnership must covenant to indemnify the vendor against the partnership liabilities : *Dodson v. Downey*, (1901) 2 Ch. 620.

Reversion.

On the sale of a reversion or remainder (so described in the particulars), the purchaser could probably be compelled to covenant to pay the succession duty unless he compounded for it : *Dart*, 580.

Restrictive
covenants.

If the vendor sells subject to restrictive covenants, the purchaser must covenant with the vendor in cases where the vendor has himself covenanted : *Poole and Clarke*, (1904) 2 Ch. 173. The proper form of covenant is a covenant by the purchaser

to observe and perform the restrictive covenants, and to indemnify the vendor against them, but this covenant should be preceded by the words "with the object and intent of affording to the vendor, his heirs, executors, and administrators, a full and sufficient indemnity in respect of the restrictive covenants, but not further or otherwise": *Ibid.* In the case of leaseholds the purchaser cannot claim to have these limiting words inserted, but the covenant will receive the same construction as if those words were inserted: *Ibid.* The purchaser was also compelled to covenant in the case of *Moxhay v. Inderwick*, 1847, 1 De G. & Sm. 708.

But if the restriction is not mentioned in the contract, and the purchaser did not know of the restriction when he bought, he cannot be compelled to complete, entering into a similar covenant: *Lukey v. Higgs*, 1854, 1 Jur. N. S. 200. If, however, he elects to complete, he must covenant: *Christmas and King*, Kekewich, J., 19th June, 1901. (Cf. *Wallis and Barnard*, (1899) 2 Ch. 515, stated above, p. 384.

A condition that the conveyance shall contain "proper reservations and provisions and covenants by the purchaser" for securing the liabilities and rights under the reservations and stipulations mentioned in the particulars (being covenants as to buildings, &c.), entitles the vendor to an unqualified covenant by the purchaser, and not merely a covenant binding him only until he assigns: *Pollock v. Rabbits*, 1882, 21 Ch. D. 466.

A stipulation in the particulars, "the purchaser will have to erect within six months from the date of the sale, and afterwards maintain, a good and sufficient fence," entitles the vendor to insert in the conveyance a covenant by the purchaser to erect within the time specified and afterwards maintain the fence, the covenant to be framed so that the benefit and burden thereof run with the land: *Cooper and Crondace*, 1901, 90 L. T. 258.

Under the stipulation "the company shall at their own expense procure a supply of water as good as the supply of water cut off by the construction of the line from the severed lands of the vendor," the vendor is only entitled to require the company to do once for all such works as would, in the ordinary course of things, secure a sufficient supply of water continuously; he is

not entitled to have inserted in the conveyance a covenant by the company to do from time to time what may be necessary to keep up the supply : *Gray and Metr. Ry. Co.*, 1881, 44 L. T. 567.

A contract for sale of land subject to restrictions as to building, the conveyance to contain a covenant on the part of the purchaser, "and proper provisions for securing the due observance and performance thereof," entitles the vendor to have inserted in the conveyance a power to enter and remove buildings not properly erected, and to retain possession until payment of the consequential expenses : *Ex parte Ralph*, 1845, De Cex, 219. If in such a case the purchaser, having entered into a binding contract, dies before completion, his devisee would, it is submitted, unless he disclaims, be bound to covenant, at all events if he takes beneficially : see *Stephens v. Hotham*, 1855, 1 K. & J. 571, stated below, p. 396.

On a sale in lots, conditions 9 and 10 provided that the purchasers should repair the roads, and should not erect buildings of less than a specified value, and should use them only as private residences. Condition 11 was as follows : "Statements to the effect of the two last preceding conditions, shall be inserted in the conveyances to the purchasers whom they may respectively affect, and such statements shall have the force and effect of contracts binding in equity." It was held that the proper way to carry out these conditions was to execute deeds of covenant separate from the conveyances, to hand these deeds of covenant to the vendor, and to endorse notices thereof on the conveyances : *Sidney v. Clarkson*, 1865, 35 Beav. 118.

On a sale in two lots there was a condition that each purchaser should, in the deed of conveyance to him of his lot, at his own cost enter into a covenant with the vendor and the other purchaser restrictive of the user of such lot, and that the vendor on his part would (if required by either purchaser, but at the cost of such purchaser) enter into a similar covenant with the purchasers restrictive of the user of other property not comprised in the sale. Lot 1 was not sold. The purchaser of lot 2 refused to enter into any restrictive covenant, on the ground that there was no purchaser of lot 1 to covenant with *him*. It was held that the purchaser was bound to covenant, as stipulated in the

Restrictive
covenants on
sale in lots.

conditions, the vendor covenanting in respect of lot 1, and therefore binding any future purchaser of that lot : *Mordy and Cowman*, 1884, 51 L. T. 721.

Conversely, the vendor is bound (where there is a general building scheme) to enter into covenants similar to those which the other purchasers would have had to enter into had the other lots been sold : *Birmingham, &c. and Allday*, (1893) 1 Ch. 342.

Where the conditions reserve to the vendor the right of selling the unsold lots either subject to or not subject to the restrictions the vendor is entitled to have a statement inserted in the conveyances of the sold lots (or rather, see above, in the deed of covenant which the purchasers have to execute) showing the freedom of the unsold lots from the restrictions : *Sidney v. Clarkson*, *ubi sup.*

An agreement to sell land in consideration of an annuity for the vendor's life charged on the land entitles the vendor not only to a charge, but to a personal covenant by the purchaser to pay the annuity : *Bower v. Cooper*, 1843, 2 Ha. 408. Where the agreement was that the purchaser should grant the vendor a life annuity to be secured by bond, it was held that on the death of the purchaser before completion the vendor was entitled to refuse to convey unless the annuity were secured to him by a valid and effectual bond : *Dixon v. Gayfere*, 1857, 1 De G. & J. 655.

A contract for the sale of minerals at a price payable by instalments, the times of payment to be accelerated if more than a certain quantity should be gotten from time to time, entitles the vendor to the insertion of a power of entering for the purpose of ascertaining the quantity of minerals worked : *Blakesley v. Whieldon*, 1841, 1 Ha. 176.

On the sale of a *chose in action* the vendor is entitled to insert in the conveyance a proviso that no action shall be commenced in his name without his previous consent or the tender of a sufficient indemnity : *Ex parte Little*, 1829, 3 Molloy, 67.

On the sale of leaseholds, if the vendor is an assignee only, and has not himself covenanted to indemnify his assigns, he cannot, it is suggested, require any covenant of indemnity, as there is no liability on his part against which he requires an indemnity : see Sug. 37.

A lessee (or an assignee of a lease who has covenanted to pay the rent and perform the covenants) is, even in the absence of stipulation, entitled to insert in the conveyance a covenant by the purchaser to indemnify him against the rent and covenants reserved by and contained in the lease : *Staines v. Morris*, 1812, 1 Ves. & B. 8. And that, too, though (in the case of a sale by the assignee) the assignment to him was executed by the lessee only : *Ibid.* The same rule would apply to a sale by an assignee who was liable as *cestui que trust* to indemnify his trustee, the trustee having taken an assignment and covenanted to indemnify his assignor and afterwards assigned to the *cestui que trust* without requiring any covenant for indemnity from him.

The executors of a lessee (or assignee who has covenanted to pay the rent and perform the covenants) were formerly, like the lessee or assignee himself, entitled to require the purchaser to give a covenant of indemnity, even in the absence of stipulation : *Staines v. Morris*, 1812, 1 Ves. & B. 8. And it makes no difference that the executors or trustees only covenant against incumbrances made by themselves, provided the purchaser knows beforehand that this is the only covenant he will get : *Ibid.*

But now that by 22 & 23 Vict. c. 35, s. 27, the personal liability of executors or administrators for breaches of covenant occurring after an assignment by them to a purchaser has been abolished, it is not clear that they can require the purchaser to covenant to indemnify them personally against the rent and covenants. It is, however, still usual for purchasers to indemnify executors or administrators selling leaseholds as well as the estate of their testator or intestate : Dart, p. 582.

The assignees of a bankrupt (under the Act of 1849) cannot require a covenant of indemnity by the purchaser against a breach of the covenants in the lease, because as far as they are concerned their liability has ceased, and as far as the bankrupt is concerned he is, in the absence of stipulation, a stranger to the sale : *Wilkins v. Fry*, 1816, 1 Mer. 244. But an equitable mortgagee of a bankrupt, if he calls for an assignment by the trustee in bankruptcy, must indemnify the trustee : *Ex parte Buston*, 1880, 15 Ch. D. 289.

Trustees (other than a bankrupt's assignees) may, it is conceived, require a covenant of indemnity to protect their beneficiaries, although they themselves are not under any continuing liability, not having covenanted. And where the trustees of a creditor's deed, which contained a covenant by the debtor to assign the leaseholds to them, sold the leaseholds, the purchaser was compelled to covenant to indemnify the debtor, although the leaseholds were (at the purchaser's request) assigned not to him, but to a third party: *Morley v. Clavering*, 1860, 7 Jur. N. S. 904.

On a sale of leaseholds in lots by way of under-lease the purchaser of any lot may be required to covenant to perform all the covenants in the original lease, so far as they affect his lot: *Browne v. Paul*, 1856, 26 L. T. o.s. 232.

Sale of
leaseholds in
lots.

In the condition "if both lots shall be sold, the purchaser of lot 1 shall take an assignment of both lots and execute an under-lease of lot 2 to the purchaser of that lot less one day, and if only one lot shall be sold the vendor shall execute to the purchaser a lease of his lot less one day," the words "if both lots shall be sold" mean if both lots are sold at the auction. If, therefore, lot 1 only is sold at the auction and lot 2 sold a week later, the purchaser of lot 1 is not entitled to have both lots assigned to him; all he is entitled to is an under-lease from the vendor or from the purchaser of lot 2: *Weller v. Stearn*, 1870, W. N. 128.

On the sale of a leasehold property in lots, with a condition providing that each lot should be sold subject to the entire rent, "but with right of indemnity against the other lots, save as to 2l. 10s." (the apportioned rent of each lot), the purchaser of each lot is entitled to an indemnity by way of charge, with powers of distress and entry on the remaining lots, of a proportionate part of the yearly head-rent in exoneration of his lot. The vendor cannot insist on giving only an indemnity in the precise words of the condition of sale: *Re Doherty*, 1884, 15 L. R. Ir. 247.

On the question what covenants by the lessee an intending lessor is, under an agreement for a lease, entitled to insert in the lease, see *Williamson v. Williamson*, 1871, 9 Ch. 729, and

Covenants in
intended
lease.

Haywood v. Silber, 1885, 30 Ch. D. 404 ; also the cases on usual covenants stated above, p. 28.

On an agreement to grant an under-lease to contain similar "covenants" to the covenants in the lease, the sub-lessor is entitled to insert a proviso for re-entry in terms similar to that in the lease : *Re Tebb*, (1879) W. N. 100. A stipulation that the under-lease shall contain "the like provisions" as are contained in the lease entitles the sub-lessor to insert similar covenants—*e.g.* a covenant against assigning without the consent of the sub-lessor : *Williamson v. Williamson*, *ubi sup.* A stipulation that the under-lease shall contain a covenant not to assign without the consent of the sub-lessor, "together with such other covenants as are contained in the lease," entitles the sub-lessor to insert, in addition to the covenant expressly mentioned, a covenant in the very words of the lease not to assign without the consent of the head-lessor : *Haywood v. Silber*, *ubi sup.*

Death of
intending
lessee.

The extent of the liability of the executors of a person who has contracted to take a lease is not clearly defined in the cases. *Phillips v. Everard*, 1831, 5 Sim. 102, seems to have been taken by Wood, V.-C., in *Stephens v. Hotham*, 1855, 1 K. & J. at p. 579, as deciding that executors could be compelled to enter into personal covenants to do that which the law would throw an obligation upon them to do if the testator had executed a lease in pursuance of the contract ; and this view appears to have been adopted by Wood, V.-C., himself. But all that was actually decided in *Phillips v. Everard* was, that the executors must take some lease, the form to be settled by the Master ; and this course was followed in *Stephens v. Hotham*. If the intending lessor prefers, he may refuse to execute a lease containing qualified covenants only ; and if the executors claim to have the lease made to them, they must enter into full covenants : *Stephens v. Hotham*, *ubi sup.*

(xi) TIME FOR DELIVERY OF DRAFT

Time.

Though the condition fixes a time for the delivery of the draft conveyance, time is not regarded as essential : *Lang v. Gale*, 1813, 1 M. & S. 111.

(xii) EXECUTION

“ On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor as such ; but shall be entitled to have at his own cost the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor ” : Conveyancing Act, 1881, s. 8. The same rule applies to transfers of registered land : see Land Transfer Act, 1897, s. 9 (1). Execution.

(xiii) TRANSFER OF PUBLIC-HOUSE LICENCE

On the sale of a public house as a going concern, the purchaser is, in the absence of stipulation, entitled to require the licence to be transferred under sect. 11 of the General Licensing Act (9 Geo. IV. c. 61), and if the vendor does not hold a licence in respect of which the ordinary application under that section can be made without delay, the purchaser is entitled to rescind : *Day v. Luhke*, 1868, 5 Eq. 336 ; *Cowles v. Gale*, 1871, 7 Ch. 12. Public house licence.

Where the vendor has agreed to make a good and proper assignment of the licence at the date fixed for completion or as soon thereafter as may be, the purchaser may rescind if the vendor at that time has no licence in his own name, or no valid licence of which he can procure a transfer to the purchaser : *Claydon v. Green*, 1868, L. R. 3 C. P. 511.

On the sale of a freehold house “ with the off-licence attached thereto,” a condition that “ if the licence should be indorsed or otherwise affected prior to the completion of the purchase the agreement should at the option of the purchaser be abandoned,” does not entitle the purchaser to rescind because of the magistrates’ refusal of an application improperly made by the purchaser for interim authority to carry on the business until the next transfer day : *Tadcaster, &c. v. Wilson*, (1897) 1 Ch. 705. All that such a condition means is that the vendor shall have a valid and effectual licence existing at the date fixed for completion, which he can indorse in the usual way, and in respect of which the purchaser could apply at once for interim protection and without undue delay for a transfer at the next special sessions ; the vendor is not bound to do more, except to

join in the purchaser's application or authorise him to use the vendor's name in the applications for interim protection and transfer of licence.

It may be noted that the indorsement on the licence of one conviction against the vendor does not prejudice the purchaser: *Ward and Jordan*, (1902) 1 L. R. 73.

(xiv) LANDLORD'S LICENCE TO ASSIGNMENT OF LEASEHOLDS

Lessor's
licence.

The vendor must use his best endeavours to obtain the lessor's licence if the lease contains a stipulation prohibiting assignments except with the lessor's licence: *Day v. Singleton*, (1899) 2 Ch. 320, stated above, p. 131. But the purchaser cannot compel the vendor to sue the landlord in order to obtain the licence; and if leaseholds are sold expressly "subject to the landlord's approval" the vendor, after using all reasonable efforts to obtain the lessor's consent and failing, is at liberty to consider the contract at an end and make his own terms with the lessor: *Lehmann v. McArthur*, 1868, 3 Ch. 496.

If the stipulation not to assign without the licence of the lessor is qualified so that the lessor may not withhold his licence in the case of a responsible assignee, the vendor can obtain specific performance, although the licence is withheld, provided the Court is satisfied that the purchaser answers the description of a responsible person: *White v. Hay*, 1895, 72 L. T. 281. It was not suggested in that case that the purchaser's title would be doubtful, as he might not be able to satisfy the Court, if an action for recovery of possession were brought against him by the lessor, that he was a "responsible person." It is also to be observed that the decision would probably have been different if the sale had been "subject to the landlord's approval."

CHAPTER XXVI

TITLE DEEDS

	PAGE
(i) Production for Verification of Abstract	399
(ii) Production otherwise than for Verification of Abstract	402
(iii) Delivery on Completion	403
(iv) Covenant for Production by Vendor	405
(v) Covenant for Production by Purchaser	408
(vi) Attested Copies	408

(i) *Production of Title Deeds for the Verification of the Abstract*

IN the absence of stipulation, the purchaser can require the vendor to produce in verification of the abstract all the documents forming the title during the period prescribed by law, or stipulated for in the contract (*Berry v. Young*, 1788, 2 Esp. 640 *n.*), at all events if they are in the vendor's possession, or he can compel their production : *Rippinghall v. Lloyd*, 1833, 5 B. & Ad. 742. If the vendor will not, or cannot, produce them, the purchaser may (subject to the rules as to lost deeds, *infra*) rescind, or, at all events, resist specific performance : *Osborne v. Harvey*, 1841, 12 L. J. Ch. 66.

What deeds
must be pro-
duced.

In the case of proved wills and instruments upon record, the vendor need not produce the originals, but he must produce office copies or examined copies : Sug. 448. But in the case of a grant from the Crown, it is sufficient if the vendor inform the purchaser where the grant is to be found : Sug. 431. Instruments upon record include a copy of court rolls, deeds enrolled under any Act making enrolment evidence, and (probably) deeds enrolled for safe custody : Sug. 448.

Instruments
upon record.

Instruments deposited in the office of Land Revenue Records and Enrolments need not be produced : certified copies are sufficient evidence : 15 & 16 Vict. c. 62, s. 8.

Expired
lease.

Inasmuch as a lessor is not entitled to have delivered to him an expired lease (*Elworthy v. Sandford*, 1864, 3 H. & C. 330), a lease determined by re-entry (*Hall v. Ball*, 1841, 3 M. & Gr. 242), or a lease surrendered in consideration of the grant of a new lease (*Knight v. Williams*, (1901) 1 Ch. 256), it would seem that a purchaser from him could not require these deeds to be produced.

Lost deeds.

The purchaser cannot rescind because documents of title have been lost or destroyed: *Harvey v. Philips*, 1743, 2 Atk. 541. But the vendor must prove that they have been lost or destroyed. Loss is sufficiently shown by proof that every reasonable search has been made: *Hart v. Hart*, 1841, 1 Ha. 1. Where the vendor is excused from the production of documents on the ground of their loss or destruction, he must prove the execution of the documents, and furnish secondary evidence of their contents: *Bryant v. Busk*, 1827, 4 Russ. 1. The execution must, as a rule, be proved by the attesting witnesses. An abstract proved to have been made before the documents were lost or destroyed is proof of the contents only, not of the execution: *Ibid.* A memorial registered in the county registry is sufficient evidence of the contents, and it would seem of the *date* of execution: *Cathrow v. Eade*, 1851, 4 De G. & S. 527. Probably it would also be held sufficient evidence of execution in the case of an old deed. But a certified copy of a memorial, which merely gives the parties the description of the lands and the names of the attesting witnesses, is insufficient secondary evidence of the contents of a lost deed: *Halifax, &c. and Wood*, 1898, 79 L. T. 536. And an abstract, supported by a statutory declaration by a solicitor and his clerk that the abstracted portions of the deeds were "practically" copies of the deeds and that the abstract had been compared with the original deeds and contained everything that was material, is also insufficient: *Ibid.* And a copy of a deed compared with the "completed draft," but not supported by any evidence that the completed draft had been compared with the deed itself (*qu.* with the engrossment), is also insufficient: *Ibid.*

A very old attested copy of a deed lodged in a public office was held sufficient secondary evidence without proof of execution: *Harvey v. Philips*, 1743, 2 Atk. 541, and (per Lord Hard-

wicke, *ibid.*) even an unattested copy would, under the circumstances, have been sufficient. A recital forty-four years old, of missing deeds, coupled with a solicitor's affidavit setting out extracts from the account books of a deceased solicitor, making charges for preparing the deeds, and for attending the execution of the deeds, was held to be sufficient proof of execution as well as contents: *Moulton v. Edmonds*, 1859, 1 L. T. 391. The vendor need not prove that the instrument lost or destroyed was properly stamped: *Hart v. Hart*, 1841, 1 Ha. 1.

Section 3 (6) of the Conveyancing Act, 1881, which throws the *expense* on the purchaser, does not relieve the vendor of the duty of production. Conditions
relieving the
vendor.

A condition that "the vendor shall not be bound to *produce* any original deed, or other documents than those in his possession, and set forth in the abstract," does not relieve the vendor from his liability to verify the title shown upon the abstract (or, at all events, to do all in his power to verify the title): *Southby v. Hutt*, 1837, 2 My. & Cr. 207. The word "produce" in such a condition means "deliver up on completion," because it is natural for a vendor to limit a purchaser's right to delivery of title deeds to those actually in the vendor's possession; but it would be unnatural to limit the purchaser's right to the verification of the abstract to deeds in the vendor's possession, excluding deeds of which he has the right or means of procuring production, as the vendor must have intended to give the best proof of his title in his power: *Ibid.* pp. 214, 215.

A condition that "the vendor shall not be compelled to produce any original title deeds or other documents not in his possession or custody," was held not to entitle the vendor to complete where a third person who had the custody of a material deed refused to produce it: *Osborne v. Harvey*, 1841, 12 L. J. Ch. 66. There was in that case another condition that "the purchaser shall collate with the abstract such of the title deeds as are in the custody of the vendor at the office of the vendor's solicitor, and all other title deeds, wills, and other muniments of title at the respective places where the same are deposited, registered or enrolled, and shall not require them to be produced elsewhere."

Under a condition that the vendor will produce the title deeds “at Norwich, at Lynn, or in London,” the vendor must give the purchaser reasonable notice at which place he intends to produce the deeds : *Rippinghall v. Lloyd*, 1833, 2 N. & M. 410.

(ii) *Production before Completion, otherwise than for Verification of the Abstract*

Inspection of all deeds.

Apart from his right to have the deeds produced for the verification of the abstract, the purchaser was formerly entitled to inspect all the title deeds in the vendor's possession, even those of an earlier date than that fixed by law or contract for the commencement of the title : *Parr v. Lovegrove*, 1857, 4 Drew. 170. This right, as to the earlier title deeds, has been taken away by the Conveyancing Act, 1881, s. 3 (3).

Purchaser not entitled to abstract.

A condition precluding the purchaser from his right to an abstract is not necessarily sufficient to preclude him from his right to inspect the title deeds. Thus, on the sale of leaseholds, the vendor to grant an under-lease to the purchaser on condition that no abstract of the vendor's title should be required was held not to preclude the purchaser from inspecting the lease under which the vendor held : *Allen v. Clark*, 1863, 11 W. R. 304 (an action for negligence against the purchaser's solicitor who had omitted the inspection).

So, too, the condition “the title of the vendors being possessory for thirty years past, no earlier title is to be required, and any investigation is to be at the expense of the purchaser, and unless an abstract is called for, and the intention of investigating the title stated, within seven days from the sale, the purchaser shall be deemed to have waived his right,” would, it seems, not preclude the purchaser from his right to see the documents of title, for the purpose of investigating the title, even after seven days had elapsed : per Wood, V.-C., in *Turner v. West Bromwich Union*, 1861, 9 W. R. 155. See also *Harding v. —*, 1826, 4 L. J. o.s. Ch. 213.

Where a purchaser is precluded from requiring the title to be shown, he has no right to discovery of the title deeds in an action for specific performance brought by the vendor, unless he can show *aliunde* that the vendor's title is bad : *Jones v. Watts*, 1890,

43 Ch. D. 574. The purchaser acquires no right to discovery in such a case by a mere denial of the vendor's title or a vague allegation that the property is subject to restrictive covenants: *Ibid.*

(iii) *Delivery of Title Deeds to the Purchaser on Completion*

In the absence of express stipulation, the purchaser is entitled on completion to all the documents of title affecting the land sold, which are in the possession or power of the vendor (*Austin v. Croome*, 1842, Car. & M. 653; *Smith v. Chichester*, 1842, 2 Dru. & War. at p. 399), unless they relate to other land retained by the vendor. The words "the purchaser to accept the best title the vendor can give" do not absolve the vendor from his duty to procure and hand over the title deeds: *Duthy and Jesson*, (1898) 1 Ch. 419.

Delivery on completion.

"Where the vendor retains any part of an estate to which any documents of title relate, he shall be entitled to retain such documents": Vendor and Purchaser Act, 1874, s. 2 (5). This enactment does not entitle the vendor to retain a document of title on the ground that it relates to other property, unless that other property is land. Thus, where a mortgagee of leaseholds and policies of assurance sold the leaseholds without a special condition as to retention of deeds, it was held he was not entitled to retain the mortgage deed: *Williams and Duchess of Newcastle*, 1897, 2 Ch. 144. The vendor is, however, entitled to retain a deed which only affects his unsold land by conveying to him an easement over it: *Lehmann and Walker*, (1906) 2 Ch. 640. In that case the vendor was at the date of the deed the owner of the servient tenement affected by a right of way; the deed conveyed to him the dominant tenement together with the right of way, so that his unity of seisin extinguished the easement. Held, that the deed was a document of title relating to the servient tenement, and as the servient tenement was retained by the vendor the deed itself could be retained by him. Probably the same result would have followed even if the easement had not been expressly conveyed.

Vendor retaining part of estate.

The vendor is not entitled to retain title deeds merely because he has covenanted to produce them to some other person—*e.g.* to

Former covenant to produce.

a first purchaser of part of the property : Sug. 435. All he can require in such a case is that the second purchaser shall covenant or give an acknowledgment for production ; see below, p. 408.

Sale in lots.

As to the delivery of the common title deeds on a sale in lots, see below, p. 429.

Vendor
unable to
deliver.

If the title deeds cannot be delivered to the purchaser, or a valid covenant or acknowledgment be given for their production, the purchaser can rescind unless the delivery of the title deeds is, under the special circumstances of the case, immaterial. *Offen v. Harman*, 1859, 29 L. J. Ch. 307. There the delivery of three deeds was held to be immaterial, because they were collateral only to the title to the property, and the vendor had produced two of them, and given attested copies, and as to the other, the vendor produced the deed at the hearing, and undertook to deliver an attested copy. The deeds which were held to be collateral only were the following : first, a deed appointing a portion and charging it on the land, the delivery of which deed was held immaterial because a subsequent deed (which was covenanted to be produced) contained an acknowledgment of the payment of this portion and a release of the land ; second, a deed charging a sum borrowed, a subsequent deed (which was covenanted to be produced) reconveying the land charged ; and third, a deed charging other land forming the consideration for a deed releasing the land sold, which latter deed was covenanted to be produced.

Expense.

The statutory condition throwing on the purchaser the expense of the production of title deeds does not apply to the case of a purchaser merely requiring the vendor to deliver the title deeds to him on completion : *Duthy and Jesson*, (1898) 1 Ch. 419.

Registered
land.

“ Where a land certificate or office copy of a registered lease has been issued, the vendor shall deliver it to the purchaser on completion of the purchase ; or, if only a part of the land comprised in the certificate or office copy is sold, he shall at his own expense produce or procure the production of the certificate or office copy in accordance with this section for the completion of the purchaser’s registration. Where the certificate or office copy has been lost or destroyed, the vendor shall pay the costs of the proceedings required to enable the registrar to proceed without

it": Land Transfer Act, 1897, s. 8 (2). It is conceived that by express stipulation the vendor may throw these costs on the purchaser.

(iv) *The Purchaser's right to a Covenant for Production or Acknowledgment and Undertaking*

Before the Conveyancing Act, 1881, the vendor retaining documents of title was bound to covenant for the production, for furnishing copies, and for the safe custody of the documents: see Sug. 452. By the Conveyancing Act, 1881, s. 9, sub-s. 8, an acknowledgment, given by persons retaining possession of documents, of the right to production will satisfy any liability to give a covenant for production and delivery of copies of, or extracts from, documents. The obligations imposed by an acknowledgment are set out in sub-sects. 4 and 6, and the persons who are bound by, and who may take advantage of, the acknowledgment, are defined in sub-sects. 2 and 3. By sub-sect. 11, an undertaking for safe custody of documents will satisfy any liability to give a covenant for safe custody. The obligations imposed by an undertaking are set out in sub-sect. 9.

Vendor retaining deed

An intending lessee, who, *by agreement*, is entitled to delivery of an abstract of title, may require a covenant or acknowledgment for the production of the title deeds notwithstanding the Vendor and Purchaser Act, 1874, s. 2, and the insertion in the agreement of a form of draft lease not containing any such covenant or acknowledgment does not show an intention that the lessee is not to have a covenant or acknowledgment: *Pursell and Deakin*, (1893) W. N. 152.

The documents in respect of which the vendor is bound to covenant, or give an acknowledgment and undertaking, are those necessary to make a title for the period fixed by law or stipulation: *Re Guest and Worth*, 1 Key & Elph. (ed. 6), 424 *n*. See *Dure v. Tucker*, 1801, 6 Ves. 460, and *Cooper v. Emery*, 1840, 1 Ph. 388. It is doubtful whether the covenant &c. need include documents which are only negative evidence of the vendor's title. In *Cooper v. Emery*, as cited in 1 Hayes on Conveyancing, 573, a purchaser from an heir-at-law, whose ancestor left a will not affecting the property, was not allowed to

What documents must be included.

insist that the covenant for production should include the will. But in *Stevens v. Guppy*, 1825, 2 Sim. & St. 439, a purchaser under the same circumstances was, on selling again, compelled to produce the will. Lord St. Leonards was of opinion (see Sug. 452) that if the negative evidence is in the custody of the vendor, the covenant should include it. With regard to instruments upon record, it would seem that the covenant or acknowledgment must include any copies which are in the vendor's possession or power, but not any other copies : *Cooper v. Emery*, 1840, 1 Ph. 388.

Where freeholds held of a manor are sold by the lord, subject to leases for lives granted by copy of court roll, the lord must covenant to produce the court rolls, prior to the date of the conveyance to the purchaser : *Poulett v. Hood*, 1868, 5 Eq. 115.

If the vendor was a trustee, his covenant for production was usually limited to his own acts, and to the period during which the deeds were actually in his custody : *Onslow v. Lord Lonsborough*, 10 Ha. at p. 74. Davidson (vol. ii. pp. 318, 321) says that mortgagees rarely covenant, unless they receive part of the purchase money, and sometimes refuse even then. The assignees of a bankrupt were, in *Ex parte Stuart*, 1815, 2 Rose, 215, held to be entitled, in the absence of stipulation, to qualify the covenant by a proviso determining their liability on their procuring a substituted covenant. But an ordinary vendor was not entitled to any such proviso, or to the limitation mentioned above : Sug. 452. The acknowledgment which, since the Conveyancing Act, 1881, a vendor is entitled to offer a purchaser instead of a covenant, is limited to the time during which the vendor has possession of the deeds : sect. 9, sub-sect. 2.

If the vendor has not possession of the deeds, he cannot give a sufficient covenant or acknowledgment and undertaking. His covenant would only make him liable in damages (Copinger, 136) ; his acknowledgment and undertaking would be altogether inoperative, even if he subsequently acquired the deeds.

In a case where the vendor has not possession of the title deeds prior to the conveyance to himself, because he bought from some one who retained the title deeds, the old law was, that if the vendor had no covenant for their production, or had only a

Sale by
trustee.

Vendor not
retaining
deeds.

Equitable
right of
production
sufficient.

covenant the burden whereof did not at law run with the land in respect of which the title deeds were retained (as was the case where the covenant had been given by a person who was not seised of the legal estate), the purchaser could refuse to complete : *Barclay v. Raine*, 1823, 1 Sim. & St. 449. But now the inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title is not an objection to the title, in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents : Vendor and Purchaser Act, 1874, s. 2, rule 3.

In the case of a sale by a mortgagor of property, part of a larger estate which is in mortgage, if the purchase money is insufficient to pay off the mortgage the deeds will be retained by the mortgagee. If the mortgage was before 1882 the vendor should be asked to obtain an acknowledgment by the mortgagee, and to give a covenant for safe custody himself. The undertaking under the Conveyancing Act, 1881, only applies where the person undertaking keeps the deeds ; an undertaking for safe custody by the mortgagee would probably satisfy the vendor's liability to give a covenant for safe custody (see subsect. 11) ; but it is unlikely that a mortgagee would give such an undertaking. If the vendor is unable to obtain the mortgagee's acknowledgment, the purchaser can, it is conceived, in the absence of stipulation to the contrary, rescind, if the mortgage was made before 1882. If the mortgage was made after 1881, sect. 16 applies, and no acknowledgment by the mortgagee is necessary.

A condition that " the vendors shall not be required to produce any deeds not in their possession, and that all deeds of covenant for production . . . which the purchaser shall require for verifying the abstract or for any other purpose . . . shall be obtained by, and at the expense of, the purchaser requiring the same," relieves the vendor not only of the expense, but of the duty of obtaining the necessary covenants for production ; and if the persons who have the deeds refuse to covenant, the purchaser must complete without a covenant for production : *Gabriel v. Smith*, 1851, 16 Q. B. 847.

Sale by mortgagor.

Condition relieving vendor.

(v) *The Vendor's right to a Covenant for Production by the Purchaser*

If the vendor delivers to the purchaser title deeds, which the vendor is bound by covenant to produce to third persons, the vendor will be entitled to require the purchaser to covenant with him for the production &c. of the title deeds, and to have the liability noticed, or endorsed on the deed of conveyance to the purchaser : Sug. 434, 435.

Condition.

An agreement that "the title deeds and documents which are in the possession or power of the vendors shall, upon completion, be delivered to the purchasers ; but as the same also relate to other estates belonging to the vendors, the purchasers shall enter into, or procure to be entered into, one or more proper and sufficient covenant or covenants with the vendors, or such other persons as they may direct, for the production and delivery of copies of the said deeds and documents," does not import that the vendors are to have a covenant which at all times, and in all circumstances, shall secure to them the production of the deeds, but merely that the vendors should have such a covenant as, according to the ordinary practice, and the views of Courts of Equity, would be deemed to be sufficient : *Onslow v. Londesborough*, 1852, 10 Ha. 67. In that case the land had been conveyed to the purchasers (who were trustees of a will), to the uses declared by their testator's will—viz. to the use of A. for life, remainder, &c. ; the Court, without deciding the question whether it would have enforced the contract if the vendors had preferred to rescind, held that the purchasers, being releasees to uses, were in the position of trustees, and not bound to enter into the covenant for production, and that the vendors must be satisfied with the covenant of A., the life tenant.

(vi) *The Purchaser's right to Attested Copies*

If the purchaser has no intimation that he will not have the deeds, he is entitled to have attested copies thereof given to him on completion : *Boughton v. Jewell*, 1808, 15 Ves. 176. As to the expense of procuring attested copies, see p. 414, below.

CHAPTER XXVII

EXPENSES

“ON a sale of any property the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents not in the vendor’s possession ; and the expenses of all journeys incidental to such production or inspection ; and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor’s possession, and all attested, stamped, office, or other copies or abstracts of or extracts from, any Acts of Parliament or other documents aforesaid not in the vendor’s possession, if any such production, inspection, journey, search, procuring, making, or verifying, is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same ; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser ” : Conv. Act, 1881, s. 3, sub-s. (6).

The statutory condition, throwing on the purchaser the expense of the production of the title deeds, does not apply to the case of a purchaser merely requiring the vendor to deliver the title deeds to him on completion : *Duthy and Jesson*, (1898) 1 Ch. 419. The statutory condition is sufficient to throw on the purchaser the expense of the vendor’s search for documents not in his possession, including, in the case of leaseholds, the lease under which he holds ; the vendor is not bound to tell the purchaser beforehand that he has not got this document in his possession : *Stuart and Olivant and Seadon*, (1896) 2 Ch. 328.

Production
of deeds.

The statutory condition is sufficient to throw the expense of production of title deeds on the purchaser even though all the title deeds are in the possession of the vendor's mortgagee, and the vendor sells "free from incumbrances"; nor is it necessary for the vendor to mention that the title deeds are not in his possession: *Willett and Argenti*, 1889, 60 L. T. 735.

Stamping and registration.

The statutory condition does not include the expense of stamping any unstamped or insufficiently stamped documents, or registering any documents which require registration. This expense will, in the absence of any express condition, fall on the vendor: *Smith v. Wyley*, 1852, 16 Jur. 1136. See further, p. 261, above.

Apportionment of tithes.

On a sale of land which together with other land not belonging to the vendor is subject to one tithe rent-charge, the vendor cannot be compelled to procure an apportionment at his own expense: *Ebsworth and Tidy*, 1889, 42 Ch. D. 23.

Abstract.

The statutory condition does not absolve the vendor from the expense of procuring and making an abstract of a deed not in his possession, forming part of the title for the statutory or agreed period; because the purchaser is not requiring an abstract of a particular deed as such, but merely asking for the abstract of title, which the vendor is bound to produce. The statutory condition assumes that the vendor has shown a title, and the abstracts of deeds to which that condition refers are not abstracts of deeds forming part of the title, but abstracts of deeds relating to incidental matters, which need not, strictly speaking, form part of the abstract: *Johnson and Tustin*, 1885, 30 Ch. D. 42. Strictly speaking, every document which is a link in the title ought to be abstracted in chief, at the vendor's expense, but the purchaser's objection that a will which was set out in an abstracted recital ought to have been abstracted in chief was in *Ebsworth and Tidy*, 1889, 42 Ch. D. at p. 34, held to be without substance. But in *Stamford Banking Co. and Knight*, (1900) 1 Ch. 287, the strict rule was observed, and the purchaser succeeded in his requisition that a recited deed forming a link in the title must be abstracted in chief at the vendor's expense.

Plans.

Tracings of plans drawn on the title deeds, and by reference to which the property is described, are part of the abstract

itself (see above, p. 265), and the cost of making such tracings and furnishing them to the purchaser must be borne by the vendor.

Facts material to the title—*e.g.* deaths and births—must be mentioned in the abstract, and the expense of discovering the facts borne by the vendor ; though the expense of *proving* these facts would, under sub-sect. (6), have to be borne by the purchaser, and it might happen that the expense of procuring the information was greater than that of proving it to be true. Facts.

Where there is a document the execution of which is necessary to complete the vendor's title, the vendor must bear the expense of its execution. Thus, where the vendor was a lessee bound by covenant to build to the satisfaction of the lessor's surveyor, and had not obtained a certificate that the surveyor was satisfied, he was obliged to procure the certificate at his own expense : *Moody and Yates*, 1885, 30 Ch. D. 344. In such a case it is the vendor's title itself which is defective, and not merely the evidence of his title. When the vendor has once procured the document it is then, of course, in his possession, and he cannot call on the purchaser to bear any expense of production. Certificate necessary to complete title.

An agreement that the costs of the contract shall be paid by the purchaser would entitle the vendor to be paid his costs of preparing the abstract : *Ex parte Addies' Charity*, 1843, 3 Ha. at p. 25.

The Conveyancing Act, 1881, s. 3 (6), has been held not to affect the rule in Ireland, that the vendor must, in the absence of express stipulation, bear the expense of a search in the registry : *Murray and Hegarty*, 1885, 15 L. R. Ir. 510. Search in Ireland.

In the absence of express stipulation, the purchaser must bear the expense of the preparation of the conveyance : *Poole v. Hill*, 1840, 6 M. & W. 835. But the expense of the perusal and execution of the conveyance by all necessary conveyancing parties must be borne by the vendor : Sug. 561. Conveyance.

The cost of an acknowledgment by a married woman whose concurrence is necessary, and of the certificate of acknowledgment, must be borne by the vendor. So, too, the cost of enrolling the conveyance, where necessary, as a disentailing assurance : Dav. vol. i. p. 478.

Registration.

The expense of the registration of the purchaser under the Land Registry Acts, 1875 and 1897, even in a compulsory registration district, and also the expense of registering in the Middlesex and Yorkshire Registries, must be borne by the purchaser. See *Mittelholzer v. Fullerton*, 1845, 6 Q. B. 989, where it was decided that the duty of registering under an Ordinance made in British Guiana lay on the purchaser on the analogy (see pp. 1019 and 1021) of the County Registration Acts. But the expense of the registration of the vendor under the Land Registry Acts, 1875 and 1897, or of procuring a transfer from the registered proprietor to the purchaser must be borne by the vendor, and a condition to the contrary is void. "Where the vendor of registered land is not himself registered as proprietor of the land, or of a charge giving power of sale over the land, he shall, at the request of the purchaser and at his own expense, and notwithstanding any stipulation to the contrary, either procure the registration of himself as proprietor of the land or of the charge, as the case may be, or procure a transfer from the registered proprietor to the purchaser": Land Transfer Act, 1897, s. 16 (2).

Conditions as to cost of conveyance.

The condition that the purchaser "shall have proper surrenders, conveyances, or assignments at his own expense," is not sufficient to relieve the vendor of the expense of procuring the concurrence of necessary parties: *Paramore v. Greenslade*, 1853, 1 Sm. & G. 541. That was a case of the sale of copyholds by a trustee, who died before completion, and it was held that, notwithstanding the condition, the trust estate had to bear the expense of the admittance of the heir of the trustee.

On a sale of copyholds under the condition "the purchaser to prepare his own conveyance and surrender at his own expense," the vendors were held bound to give the purchaser a surrender of the legal estate, and pay the fines necessary to enable them to surrender: *Whiteley v. Taylor*, 1876, 35 L. T. 187.

A condition that the vendor should execute a proper assurance to the purchaser, "such assurance, and every other assurance and act (if any) required by the purchaser for perfecting and completing the vendor's title to be prepared and done by and at the expense of the purchaser," is sufficient to throw on the purchaser the cost of a deed of confirmation rendered necessary by the

fact that an insurance company, predecessors in title of the vendor, had not conveyed the property in accordance with the private act of the company : *Woods and Lewis*, (1898) 1 Ch. at p. 437 (point not mentioned on appeal, (1898) 2 Ch. 211).

On a sale "free from incumbrances" a condition that the vendor "and all other necessary parties if any" should execute a proper assurance, and that "such assurance and every other act and thing required by the purchaser for perfecting or completing the vendor's title or otherwise should be prepared, made, and done by and at the expense of the purchaser," was held to throw on the purchaser the cost of obtaining the concurrence of the vendor's mortgagee, although the purchaser was, at the date of the contract, ignorant of the existence of any mortgage : *Willett and Argenti*, 1889, 60 L. T. 735.

The condition "if the purchaser shall require a conveyance of any outstanding legal estate or of any outstanding term, the expense shall be borne by the purchaser," has been held not to embrace a mortgage term, which, though satisfied in one sense by the transfer of a certain sum in Court to a separate account, was not, in the strict sense, a satisfied term : *Stronge v. Hawkes*, 1856, 27 L. T. o.s. 150. *Seem*, such a condition only refers to the case where the purchaser gets a complete conveyance without the assignment of the term : *Ibid*.

The condition "the assurance and every instrument required &c., to be prepared by, and at the expense of the purchaser," does not throw on the purchaser the cost of perusal and execution by a mortgagee : *Sander and Walford*, 1900, 83 L. T. 316.

Where, before the passing of the Land Transfer Act, 1897, property had been sold under conditions providing for the payment of the purchase money by instalments, the last of which was not payable until the land sold had come under the operation of the Act and within a compulsory area, the vendor was held bound to bear the expense of registering the purchaser with a possessory title, by reason of a condition that the price of each lot should "include the cost of conveyance (stamp duty excepted) to be prepared and completed by the vendor's solicitors" : *Conservative Building Society*, Byrne, J., in chambers, March 1900 (*ex relatione*). This was a summons in the winding-up taken

Free
conveyance.

out by the liquidator of the society (the vendors), the purchaser appearing on the summons.

Covenant for
production.

Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser : Vendor and Purchaser Act, 1874, s. 2, rule 4.

Attested
copies.

The expense of procuring attested copies of deeds which the vendor retained was, before the Conveyancing Act, 1881, and in the absence of stipulation, borne by the vendor : *Boughton v. Jewell*, 1808, 15 Ves. 176. But the condition "the vendor shall retain the custody of the title deeds, and a covenant will be entered into for the production of such of them as are not enrolled, and for giving attested or other copies thereof to the respective purchasers at their expense," was sufficient to throw the expense on the purchaser : *Cotton v. Scudamore*, 1855, 1 K. & J. 321. And the condition "all attested copies which may be required by the purchaser for the purpose of verifying the abstract or for any other purpose whatever shall be sought for and procured at the expense of the purchaser," was held to cover the case of copies required by the purchaser, who, as the purchaser of a lot held under a common title with a larger lot, would not get all the title deeds relating to his lot : *Abbott v. Darnell*, 1856, 4 W. R. 314. But a similar condition in *Peterson v. Elwes*, 1858, 6 W. R. 611, was held not sufficiently explicit to throw the expense on the purchaser. In the absence of stipulation this expense is now borne by the purchaser : Conv. Act, 1881, s. 3 (6).

Sale in lots.

As to the expenses of abstract, conveyance, attested copies, and covenants for production on a sale in lots, see pp. 429 and 430, below.

CHAPTER XXVIII

FORFEITURE OF THE DEPOSIT, AND RE-SALE BY THE VENDOR

(i) *Forfeiture of Deposit*

IN the absence of any condition, the deposit is not merely a part payment of the purchase money, but also a guarantee that the contract shall be performed ; and if the contract is not completed, owing to the purchaser's default, the deposit is forfeited : *Ex parte Barrell*, 1875, 10 Ch. 512, approved in *Howe v. Smith*, 1884, 27 Ch. D. 89. But where there is no condition for forfeiture of the deposit, the vendor cannot claim rescission of the contract and also a declaration that the deposit is forfeited : *Jackson v. De Kadich*, (1904) W. N. 168.

In the
absence of
condition.

The conditions may be silent as to the forfeiture of the deposit, or may simply direct the deposit to be forfeited in case of the purchaser's default, or may also provide for the payment of damages. It is a question of construction in each case whether the deposit is to be forfeited or not : *Howe v. Smith*, 1884, 27 Ch. D. 89 ; *Palmer v. Temple*, 1839, 9 Ad. & E. 508.

Condition as
to forfeiture.

In *Palmer v. Temple*, *ubi sup.*, the sale was expressed to be made in consideration of 300*l.* paid "by way of deposit and in part of" the full purchase money, and contained a distinct clause providing that in case of non-completion the party in default should pay the other 1,000*l.* as liquidated damages. The purchaser made default. It was held that the deposit of 300*l.* was not forfeited, since the clause as to the 1,000*l.* showed it was the intention of the parties to give the vendor 1,000*l.*, and no more, by way of damages for the purchaser's default. That decision, as Cotton, L. J., says in *Howe v. Smith*, *ubi sup.*, turned on the express terms of the proviso.

In *Howe v. Smith, ubi sup.*, the purchaser paid 500*l.* “as a deposit and in part payment of the purchase money,” and the agreement stipulated that in case of the purchaser’s default the vendor should be at liberty to re-sell and recover the deficiency on the second sale and expenses as liquidated damages. The vendor re-sold at the same price. It was held that the purchaser could not recover the deposit.

Deposit not
a penalty.

The deposit is never regarded as a penalty or its forfeiture relieved against. The claim to the deposit as forfeited is not a claim to a penalty, but a claim to damages for breach of the agreement, which the parties have settled at a fixed sum: *Collins v. Stimson*, 1883, 11 Q. B. D. 142. But a deposit differs from a sum agreed to be paid as “liquidated damages,” because it is forfeited, even where the Court would construe the words “liquidated damages” as a penalty and relieve against them: *Wallis v. Smith*, 1882, 21 Ch. D. 243.

In *Hinton v. Sparkes*, 1868, L. R. 3 C. P. 161, there was a stipulation that, if the purchaser failed to complete, the deposit of 50*l.* should be “forfeited in part of the following damages,” which included a sum of 50*l.*, described as “agreed upon to be the damages ascertained and fixed on the breach hereof.” The purchaser made default. It was held, that though the sum of 50*l.* “liquidated damages” might be treated as a penalty, and therefore relieved against, yet the 50*l.* “deposit” was forfeited in full, even though the vendor had not sustained so much damage.

Word “de-
posit” not
necessary.

Except where the money is not paid or deposited, see p. 419, it is not necessary to call it a “deposit” in the contract. If a sum styled “liquidated damages” is actually deposited—*i.e.* placed in the hands of the vendor or of a third party to abide the event, it is a deposit, and liable to forfeiture as such, even though as “liquidated damages” it might have been treated as a penalty: see below, pp. 421 to 424, on the construction of the words “liquidated damages.”

Purchaser’s
default must
amount to
repudiation.

In the absence of agreement as to the forfeiture of the deposit, the deposit is not forfeited unless the purchaser’s default is an actual or constructive repudiation of the contract: *Howe v. Smith*, 1884, 27 Ch. D. at p. 95.

Protracted delay in paying the purchase money, in the face of the urgency of the vendor to complete, may amount to "constructive" repudiation. In *Howe v. Smith*, 1884, 27 Ch. D. 89, the 24th of April was the day fixed by the agreement for completion; but the vendor's solicitor, by a letter written at the same time as the agreement, agreed that the clause of re-sale should not be put in force till six weeks after the 24th of April. After vainly pressing for completion, the vendor, on the 20th of June, agreed to give a month's time, the purchaser paying certain costs. The month expired without the purchaser paying the purchase money. It was held that the vendor was justified in treating the purchaser as making default and in himself rescinding the contract, and that the deposit was forfeited.

Protracted
delay.

But mere delay, even for a very long period, does not necessarily amount to repudiation: *Levy v. Stogdon*, (1898) 1 Ch. 478, not appealed on the question of forfeiture of deposit: (1899) 1 Ch. 5.

Abandonment of the land by a purchaser who had been let into possession, together with failure to pay an instalment of the purchase money, may amount to repudiation: *Cornwall v. Henson*, (1899) 2 Ch. 710.

The protestations of the purchaser, that he desires to complete, are of no avail if his delay is so great as to amount to "constructive" repudiation: *Howe v. Smith*, 1884, 27 Ch. D. 89.

Protestations.

If the condition says that the deposit shall be forfeited if the purchaser fails to complete within a specified time, the Court relieves against the condition unless time is of the essence of the contract: *Lennon v. Napper*, 1802, 2 Sch. & Lef. at p. 684.

Time not of
the essence.

Where time was not originally of the essence of the contract, but the vendor has subsequently given the purchaser reasonable notice to complete within an extended time and made the extended time of the essence (see above, p. 304), the purchaser will be treated as in default, if he fails to complete within the extended time; and, it is submitted, the deposit will be forfeited under the conditions or under the general law. This last point does not appear to have been decided. But it would seem that in such a case there is no reason why equity should relieve the purchaser from the consequences of his failure to complete

within the time originally fixed. On the purchaser failing to comply with the vendor's notice fixing an extended time, the vendor's original right to forfeit the deposit revives. In other words, the equitable relief to the purchaser (relieving him from the duty of completing within the time originally fixed) was conditional on his completing within a reasonable extended time; the condition not being fulfilled, equity leaves the parties to their common law right.

Defect in
title.

If the purchaser repudiates the contract on the ground that the vendor's title is defective, the question arises, Was this the purchaser's default, or was it not rather the vendor's? Where the vendor's title has been proved to be bad (as where the vendor commits an act of bankruptcy before the day fixed for completion: *Powell v. Marshall*, (1899) 1 Q. B. 710), or is admitted to be bad, the vendor is in default, and the purchaser, on discovering the defect, is entitled to recover his deposit, unless the contract contains some condition which binds him to complete notwithstanding the defect in the title.

No title
at all.

If the defect in title is covered by the conditions, the purchaser forfeits his deposit, even if in consequence of that defect the vendor has no title at all: *Scott and Alvarez*, (1895) 2 Ch. 603.

Defect dis-
covered after
purchaser's
default.

If the contract has once been put an end to in consequence of the purchaser's default, the deposit is forfeited for good, notwithstanding the subsequent discovery of a defect in the vendor's title which would have enabled the purchaser to rescind and recover his deposit. In *Soper v. Arnold*, 1889, 14 App. Ca. 429, after the title had been accepted and the conveyance approved, the purchaser, being unable to find the residue of the purchase money at the date of completion, abandoned the contract. The vendor, in pursuance of the power given him by the conditions of sale, put the property up for sale, and upon the re-sale a defect in the title, which the defaulting purchaser had overlooked, was discovered, and the contract for re-sale rescinded. The purchaser on the first sale then claimed a return of his deposit, on the ground that, as the vendor had no title to the property, the contract was entered into under a "common mistake." It was held that the vendor was entitled to retain the deposit.

The trustee in bankruptcy of the purchaser, if he repudiates the contract, has no right to a return of the deposit : *Depree v. Bidborough*, 1863, 4 Giff. 479. Bankrupt purchaser.

A re-sale by the vendor does not entitle the purchaser to a return of the deposit, even though the vendor succeeds in obtaining the same price (*Howe v. Smith*, 1884, 27 Ch. D. 89) ; or a higher price (*Lethbridge v. Kirkman*, 1855, 25 L. J. Q. B. 89). On the right of the purchaser to have the forfeited deposit set off against the damages payable by him to the vendor, see p. 420, below. Re-sale by vendor.

A sum agreed to be paid as a "deposit" is, it would seem, like a sum actually deposited, liable to forfeiture in case of the purchaser's default. The fact that the deposit was not actually paid does not make it any the less a deposit. Willes, J., in *Hinton v. Sparkes*, 1868, L. R. 3 C. P. at p. 166, says, "The only other question is whether the vendor is to be in any worse position because the deposit was not paid down at the time. I cannot see why the rights of the vendor should be affected by the purchaser's having committed two breaches of contract instead of one." In that case the purchaser gave an I O U for the amount of the deposit, and so was considered as having actually paid the deposit; and the vendor was held to be entitled to recover the amount of the I O U in full, although such amount exceeded the damages he had sustained. It would seem from *Wallis v. Smith*, 1882, 21 Ch. D. at p. 255, that the agreement to pay a certain sum as deposit into a bank in the joint names of the vendor and purchaser makes that sum a deposit whether it is actually paid or not. "Deposit" not actually deposited.

(ii) *Re-sale by Vendor and recovery of Damages*

In the absence of any condition the vendor is, upon the purchaser's default, entitled to re-sell and to recover in addition to his expenses any deficiency of price on the re-sale as damages against the purchaser : *Noble v. Edwardes*, 1877, 5 Ch. D. 378 ; *Essex v. Daniell*, 1875, L. R. 10 C. P. at p. 553. Re-sale.

The vendor's right to damages is not necessarily satisfied by the forfeiture of the deposit : *Crutchley v. Jerningham*, 1817, 2 Mer. at p. 506. In that case the purchaser had admitted the

title and taken possession. The earlier case of *Savile v. Savile*, 1721, 1 P. W. 745, deciding that the purchaser might elect to forfeit his deposit, must be considered as overruled.

Even a stipulation that the deposit "shall be forfeited as liquidated damages" has been held not to bar the vendor's right to full damages, if he can prove that he has suffered damage beyond the amount of the deposit: *Icely v. Grew*, 1836, 6 N. & M. 467. But this decision may well be doubted, since, in *Lea v. Whitaker*, 1872, L. R. 8 C. P. 70, where there was a stipulation that either party failing to complete should forfeit to the other his deposit money (already paid to a third party) "as and for liquidated damages," the purchaser was held not entitled to any damages beyond the deposit. It is difficult to understand how the same words should be construed differently, according as it is the vendor or the purchaser who is suing; if anything, it would be expected that they should be construed more strictly against the vendor. The *ratio decidendi* in *Icely v. Grew* was the very narrow interpretation which the Court put upon the words "if the purchaser shall neglect or fail to comply with *any of the above conditions*," which were held to import only a partial failure on the purchaser's part, and not a repudiation of the whole contract. This construction seems a most unreasonable one.

The vendor who has re-sold is not entitled to sue the defaulting purchaser for the original purchase money in full, but only for the deficiency: *Lamond v. Davall*, 1847, 9 Q. B. 1030. And in ascertaining the deficiency on a re-sale under the condition credit must be given for the deposit: *Ockenden v. Henly*, 1858, E. B. & E. 485, approved in *Essex v. Daniell*, 1875, L. R. 10 C. P. at p. 554, and *Howe v. Smith*, 1884, 27 Ch. D. at p. 105.

No re-sale.

The vendor's right under an express condition to damages for the "expenses of and incidental to the present sale" exists independently of any attempt by the vendor to re-sell, and is cumulative to the vendor's right to the forfeiture of the deposit if he makes no attempt to re-sell: *Essex v. Daniell*, 1875, L. R. 10 C. P. 538. And this is also, it seems, the vendor's right in the absence of express condition: *Ibid.* p. 553.

If the purchaser has repudiated the contract, the vendor is not bound to re-sell; even if the contract expressly empowers him to re-sell, he may retain the land and grant a lease of it to a third party: *Cornwall v. Henson*, (1899) 2 Ch. 710. On appeal, (1900) 2 Ch. 298, it was held that the purchaser had not repudiated, the Court of Appeal expressing no opinion as to whether the vendor's only remedy was a re-sale.

If the vendor has re-sold at the same price (or even, it is conceived, if he has re-sold at a higher price) the deposit is none the less forfeited: *Howe v. Smith*, 1884, 27 Ch. D. 89. According to Fry, L. J., *ibid.* p. 105, the default of the purchaser "affords the vendor an alternative remedy, so that he may either affirm the contract and sell under this clause, or rescind the contract and sell under his absolute title. If he act under the clause, he must bring the deposit into account in his claim for the deficiency; if he sell as owner, he may retain the deposit, but loses his claim for the deficiency under the clause in question." The option so given to the vendor is not, however, it is conceived, one which he must openly adopt before his re-sale: in other words, he may await the result of the re-sale before he makes up his mind whether he is selling under the power of re-sale given him by the condition or under his power to sell as absolute owner, treating the contract as repudiated by the purchaser.

No loss on re-sale.

If the purchaser has made default and the vendor has re-sold at a higher price, the purchaser cannot call for an account of the surplus: *Ex parte Hunter*, 1801, 6 Ves. at p. 97.

Profit on re-sale. ✓

The condition enabling the vendor to re-sell usually provides that the vendor shall be entitled to recover any deficiency on a re-sale as well as the expenses of the original sale "as and for liquidated damages."

'Liquidated damages.'

Sometimes other matters are mixed up in the same condition, so that there results a doubt whether the sum is truly liquidated damages, or only a penal sum. If the Court comes to the conclusion that a stipulated sum is only a penalty, then, even though it is described in the contract as liquidated damages, the Court will only allow the damages actually sustained: see 8 & 9 Wm. III. c. 11, s. 8. The criterion is this: can the sum

stipulated be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation ? : *Clydebank case*, (1905) A. C. at p. 19, cited in *Public Works Commissioner v Hills*, (1906) A. C. at p. 375.

For payment
of less sum.

Where the sum is to be paid for breach of stipulations, all or some of which are or one of which is for the payment of a sum of money of less amount than the stipulated sum, that sum will be treated as a penalty : *Kemble v. Farren*, 1829, 6 Bing. 141 ; *Re Newman*, 1876, 4 Ch. D. 724.

In one case the contract contained a stipulation that 5,000*l.* deposit should be paid, 500*l.* part thereof, to be paid on the execution of the contract, and a stipulation that if the purchaser should commit a substantial breach of the contract the deposit of 5,000*l.* should be forfeited, and if it had not already been paid 5,000*l.* should be paid as liquidated damages. The sum of 500*l.*, part of the deposit, was not paid, and the purchaser failed to carry out the contract. It was held that the non-payment of the 500*l.* was not a breach for which the 5,000*l.* was to be paid as liquidated damages, because the parties to the contract did not contemplate its non-payment : *Wallis v. Smith*, 1882, 21 Ch. D. 243.

For trivial
breach.

Where a large sum is to be paid for the breach of one or more stipulations (none of which is the payment of a less sum of money), and it is clear to the Court that the amount of actual damage in the case of a breach of one of such stipulations must of necessity, or will in all probability, be small, it seems that the sum will be treated as a penalty. There are conflicting *dicta* on this point. In *Betts v. Burch*, 1859, 4 H. & N. 506 ; *Kemble v. Farren*, 1829, 6 Bing. 141 ; and *Wallis v. Smith*, 1882, 21 Ch. D. 243, it was thought that the sum would be treated as a penalty : but as Jessel, M. R., at p. 257 of that case, and Cotton, L. J., at p. 270, pointed out, the matter is still open to discussion. On the other hand, in *Reilly v. Jones*, 1823, 1 Bing. 302, where there were several stipulations, and the contract provided that "either of them" (the contracting parties) "not fulfilling all and every part, the party not fulfilling shall pay to the other the sum of 500*l.* hereby settled and fixed as liquidated

damages," it was held that the sum of 500*l.* was not a penalty. There seems to be no reason in principle why the Court should not in construing the condition above referred to limit the payment of the sum fixed as "liquidated damages" to a breach of the main agreement, which is probably the intention of the parties. An agreement for the payment of liquidated damages for the breach of a contract ought if possible to be construed as referring to a substantial breach, not to minute or trifling breaches : see *Cotton v. Bennett*, 1884, 51 L. T. 70.

In *Reilly v. Jones*, *ubi sup.*, it might have been thought that the language of the contract negated the presumption that liquidated damages were to be paid only in the event of a substantial breach, and that the case stood apart from any rule applicable to ordinary cases. The decision is open to grave doubt, but is approved of in *Lea v. Whitaker*, 1872, L. R. 8 C. P. at p. 76, on the ground that the damages were really payable on a breach of the main object of the agreement. See, further, *Willson v. Love*, (1896) 1 Q. B. 626 ; *Magee v. Lavell*, 1874, L. R. 9 C. P. at p. 111 ; *Pye v. Brit. Automobile, &c.*, (1906) 1 K.B. 425.

Where the sum fixed as liquidated damages for the breach of a contract, containing stipulations of varying importance, is only payable if the purchaser commits a "substantial breach," the Court will construe "liquidated damages" literally : *Wallis v. Smith*, 1882, 21 Ch. D. 243.

Where the sum is to be paid for a breach of several stipulations of different degrees of importance, and the damage for the breach of each stipulation is unascertainable, or not readily ascertainable, and would in all probability not be insignificant compared with the sum fixed, the Court will treat the sum as liquidated damages and not a penalty : *Wallis v. Smith*, *ubi sup.* There is a *dictum* of Lord Coleridge to the contrary, in *Magee v. Lavell*, 1874, L. R. 9 C. P. 107, which is approved by Lord Bramwell in *Re Newman*, 1876, 4 Ch. D. 724 ; but this *dictum* was dissented from in *Wallis v. Smith*, by Jessel, M. R., who says that the *dictum* is opposed to what Tindal, C. J., says in *Kemble v. Farren*, 1829, 6 Bing. 141.

For unascertainable damages.

Sum
deposited.

Where the sum styled "liquidated damages" is placed in the hands of the vendor or of a third party to abide the event, this tends to show that the sum is not a penalty: *Pye v. Brit. Automobile, &c.*, (1906) 1 K. B. at p. 430. See above, p. 416.

Trustees not
enforcing the
condition.

Trustees who neglect to enforce the condition as to re-selling and recovering the deficiency from the defaulting purchaser, are not necessarily guilty of a breach of trust: *Thomson v. Christie*, 1852, 1 Macq. 236.

Procedure.

If under the condition for forfeiture of the deposit the vendor in an action for specific performance claims alternatively by his writ a declaration that he is entitled to forfeit the deposit, the Court will, on his election, make the declaration, the plaintiff paying the costs of the action: *Kingdon v. Kirk*, 1887, 37 Ch. D. 141. The alternative claim must appear in the writ, it is not sufficient to insert it in the statement of claim: *Ibid.* But query this? See cases of vendor suing for specific performance and afterwards amending and suing for damages: *Hipgrave v. Case*, 1885, 28 Ch. D. 356; *Nicholson v. Brown*, (1897) W. N. 52.

When a condition for forfeiture of deposit and for recovering the deficiency on a re-sale is employed, the vendor, if he has obtained judgment for specific performance, may, on the purchaser's default in complying with the judgment, obtain in lieu of an order rescinding the contract an order declaring the deposit forfeited and for payment of any deficiency on a fresh sale: *Griffiths v. Vezey*, (1906) 1 Ch. 796.

CHAPTER XXIX

SALE IN LOTS

WHEN two (or more) lots are bought by the same purchaser, a question sometimes arises, whether the purchase of one lot is affected by the purchase of the other lot. If one memorandum only is signed giving one aggregate sum as the purchase money there is only one contract for the two lots : *Dykes v. Blake*, 4 Bing. N.C. 463. But even if separate contracts are entered into for each lot, the purchase of one lot may be dependent on the purchase of the other lot. The purchaser, if entitled to rescind as to one lot, may rescind as to both, if the lot in respect of which he is entitled to rescind is necessary to the enjoyment of the other lot, or would render the other lot more valuable : see above, p. 87.

Two lots
bought by
same
purchaser.

So, too, in a case where the contract is insufficient to satisfy the Statute of Frauds, although an act of part performance in relation to one lot will not take the other lot out of the statute (*Buckmaster v. Harrop*, 1807, 13 Ves. at p. 474), yet if the other lot is necessary to the enjoyment of the first lot, or would render it more valuable, the sale or purchase of the first lot alone could not be specifically enforced against the wish of the defendant. See below, p. 458.

A declaration appended to certain lots that the timber is to be paid for implies that the timber on the other lots is not to be paid for, and this implication is not removed by a condition in general terms that the timber is to be paid for at a valuation : *Higginson v. Clowes*, 1808, 15 Ves. 516.

Timber.

On a sale of land in lots which had formerly been held by different tenants, with a licence for the tenant of lot 5 to have a supply of water from lot 6, a condition that "each lot is sold

Easements.

subject to the rights of way and water and other easements (if any) subsisting thereon," was held not to entitle the vendor to reserve, in the conveyance to the purchaser of lot 6, a right of water in favour of the purchaser of lot 5 : *Russell v. Harford*, 1866, 2 Eq. 507 : *Daniel v. Anderson*, 1862, 31 L. J. Ch. 610. That would have been creating a new easement, which is not what the condition contemplated. But the condition "lot 2 is sold subject to the right of the vendors and their successors in title, the owners of lot 1 to exercise and enjoy the rights of way which are now exercised and enjoyed by the tenant of lot 1," entitles the vendors to reserve a new easement corresponding to the user *de facto* of the tenant : *Tavistock Brewery and Gilbert*, Byrne, J., 8 Mar. 1900. For easements to be implied from the sale plan, see above, p. 45.

Leaseholds
under one
lease.

On a sale in two lots of property held under one lease containing special covenants, the conditions provided for apportionment of the rent, but not for the protection of each purchaser against the non-performance by the other of the special covenants, except by stipulating that each purchaser should execute a bond for 1,000*l.* to the vendor to indemnify him against the rent and covenants. The purchaser of one of the lots objected to complete, on the ground that he might lose the property through the default of the other. He had inspected the lease at the sale, and was therefore held to be affected with notice of the covenants, and bound to complete : *Paterson v. Long*, 1843, 6 Beav. 590.

Annual
payments.

The condition "the estates are subject to the payment of 120*l.* a year to the curate of N., but the same, and the perpetual annual payment of 20*l.* to the hospital of C., are in future to be charged upon and paid by the purchaser of lot 1 only," does not give the purchasers a right to have their lots absolutely exonerated from these payments, but only a right to an indemnity by the purchaser of lot 1 : *Casamajor v. Strobe*, 1819, 2 Sw. 347.

Apportion-
ment.

If land subject to one tithe rent-charge is sold in lots without any condition throwing on the purchasers the duty and expense of apportionment, this burden might be held to be on the vendor : *Ebsworth and Tidy*, 1889, 42 Ch. D. at p. 50.

Where a site, part of a building estate, is sold and conveyed subject to the condition "the walls between adjoining houses to be party-walls, the middle of which shall be the boundary between the sites, the purchaser first building a party-wall to be repaid by the purchaser of the adjoining site one-half of the value of the party-wall," and the purchaser builds the party-wall and afterwards the adjoining site is sold and conveyed to another person subject to a similar condition, then, as soon as that other person uses the party-wall by building on it, an implied contract arises between him and his neighbour (the first purchaser) to pay one-half of the cost of the wall: *Irving v. Turnbull*, (1900) 2 Q. B. 129. And a conveyance by the first purchaser to a sub-purchaser passes, without express mention, both the licence to build the wall and the right to be paid for it: *Ibid*.

Restrictions mentioned in conditions on a sale in lots may be meant by the vendor, and understood by the purchasers, either as for the benefit of the vendor only, or for the common advantage of all the purchasers. It is a question of fact in each case, and if the intention and undertaking are clear, the purchasers can enforce the restrictions against each other, and, if some of the land is unsold, against the vendor himself. If the vendor retains no land adjoining the land sold the inference is that the purchasers were intended to have the benefit of the restrictions: *Nottingham, &c. v. Butler*, 1886, 16 Q. B. D. 778. But the mere fact that the vendor retains land adjoining that offered for sale does not show an intention that the restrictions are imposed for the benefit of the vendor only: *Birmingham, &c. and Allday*, (1893) 1 Ch. 342.

The condition "the vendor reserves the right of selling the unsold lots or any of them . . . either subject to or not subject to the stipulations as to fencing and other stipulations contained in the particulars or these conditions." is sufficient to prevent the purchasers from setting up a general building scheme: *Sidney v. Clarkson*, 1865, 35 Beav. 118. As to the form of the conveyance of the sold lots, see above, p. 392.

The condition "the vendors reserve to themselves the power of allowing a variation in the plans and conditions" does not prevent the purchasers from setting up a building scheme. Such

Party-wall.

Restrictive covenants.

a condition, though it may perhaps not authorise a radical alteration in the building scheme, will enable the vendors to close a road which is a mere *cul de sac*: *Whitehouse v. Hugh*, (1906) 2 Ch. 283.

The mere fact that an estate is marked out on a plan in building lots, with a building line extending through all the plots, is not sufficient to show a general building scheme: *Pollard v. Gare*, (1901) 1 Ch. at p. 840.

If the property to be bound by the restrictions is left undefined, and there is no clause binding the vendor to observe the restrictions as to the unsold lots and the vendor has express power to vary, the Court will probably hold that there was no building scheme: *Osborne v. Bradley*, 1904, 73 L. J. Ch. 49.

The purchaser is not entitled to assume that an estate is governed by a building scheme merely from the fact that a plan has been prepared by the vendor and produced to the purchaser showing lots with houses marked on them, and that the agreement for the sale of his lot is on a printed form: *Tucker v. Fowles*, (1893) 1 Ch. 195.

Where, after selling and conveying three plots of an estate to purchasers who entered into the same restrictive covenants, the vendor put up the remainder of the estate for sale by auction subject to similar restrictions, the sale plan showing the sold and unsold plots, the Court inferred that there was a building scheme and that the purchasers at the auction were intended to have the benefit of the covenants entered into by the purchasers who had bought before the auction: *Nalder, &c. v. Harman*, 1900, 83 L. T. 257; *Rowell v. Satchell*, (1903) 2 Ch. 212.

A condition that the purchasers of specified lots shall respectively covenant with the vendors to erect a shop and dwelling house of a given minimum value does not import a *negative* stipulation in favour of the purchasers of the other lots that nothing but shops and dwelling houses shall be erected on the specified lots: *Holford v. Acton U. D. Council*, (1898) 2 Ch. 240.

Where, on a sale in lots, subject to common conditions, one being "The purchaser will be required to build according to the elevation of lot 2, or such other elevation as the vendor shall approve," the purchaser of one lot, for the purpose of building in

accordance with the conditions, excavated the land in a proper manner, but so as to render the soil insufficient to support the building of the purchaser of the adjoining lot, it was held that the latter had no right of action, the excavation having been licensed or even required by the conditions: *Murchie v. Black*, 1865, 19 C. B. N.S. 190.

“On a sale of any property in lots, a purchaser of two or more lots held wholly or partly under the same title shall not have a right to more than one abstract of the common title, except at his own expense”: Conveyancing Act, 1881, s. 3, sub-s. (7.) Abstracts.

On a sale in lots, a purchaser who had bought two lots would, it is conceived, be entitled to separate conveyances at the vendor's expense, unless the lots had been consolidated. Conveyances.

Where two or more lots are held wholly or partly under the same title, in the absence of stipulation the purchaser of the largest lot in value is entitled to the deeds relating to the common title, and must give the purchasers of the other lots acknowledgments and undertakings (formerly covenants for production): *Griffiths v. Hatchard*, 1854, 1 K. & J. 17. Title deeds.

It is submitted that, in the absence of stipulation, the purchaser who pays the largest aggregate amount of purchase money is entitled to the deeds relating to the common title, in preference to the purchaser who pays the highest price for a single lot.

If lots remaining unsold at one sale are afterwards put up at another sale by auction, new rights arise, and the purchaser of the largest lot in value at the first sale or at both sales together is not as such entitled to the deeds: *Re Lowe*, 1901, 36 L. J. Notes, 73.

The condition that the purchaser of the “largest lot” shall be entitled to the possession of the title deeds is construed to mean the largest in superficial area: *Griffiths v. Hatchard*, 1854, 1 K. & J. 17.

Where by the conditions the purchaser of the “largest lot” is to have the title deeds, the purchaser of the largest single lot will have the title deeds, in preference to the purchaser of the largest aggregate amount (in area or value) made up by several lots: *Scott v. Jackman*, 1855, 21 Beav. 110.

Where the vendor agrees to hand over the common title deeds to the purchaser of the largest lot in amount, but the conditions are silent as to what is to take place if one lot is unsold, it would seem that the Vendor and Purchaser Act, 1874, s. 2 (5), allowing the vendor to retain title deeds (see p. 403), is excluded, and the purchaser of the largest lot is entitled to the deeds : *Re Doherty*, 1884, 15 L. R. Ir. 247.

In the case of registered land, the land certificate does not stand in the same position as deeds relating to a common title. Fresh certificates will be given to each purchaser without fee. (See Brickdale & Sheldon, p. 82.) In the absence of stipulation, the vendor would probably be held entitled to retain the land certificate until the completion of the sale of all the land comprised in it. Thereupon the original land certificate would become of no value to any person, and it is conceived the Court would not entertain any claim for its delivery even if any one of the purchasers were entitled to its possession.

Attested
copies.

Where one purchaser gets the common title deeds, the other purchasers are, in the absence of stipulation, entitled to attested copies thereof at the vendor's expense, even where the expense would be very great, as on a sale in 144 lots : *Dare v. Tucker*, 1801, 6 Ves. 460. The Conveyancing Act, 1881, s. 3, sub-s. (6), merely refers to the case of the *vendor* retaining the title deeds.

On a sale in lots before the Vendor and Purchaser Act, 1874, under a condition that the purchaser of the largest lot in value shall have the deeds and covenant to produce them to the other purchasers, the expense of the covenant for production had to be borne by the purchaser requiring the covenant, and not by the vendor : *Strong v. Strong*, 1858, 4 Jur. N. S. 943.

CHAPTER XXX

SALES BY TRUSTEES AND MORTGAGEES. DEPRECIATORY
CONDITIONS1. *Sale by Trustees*

A TENANT for life selling under the Settled Land Act, 1882, has a fiduciary character : see sect. 53. But sect. 54 protects purchasers dealing with him in good faith.

A railway company selling surplus land has no fiduciary character, and may employ the same conditions as any other vendor : *Higgins and Hitchman*, 1882, 21 Ch. D. 95.

Trustees are entitled to employ counsel to draw the conditions of sale. See *Ex parte Lewis*, 1843, 3 M. D. & D. 173. Employment
of counsel.

Trustees may sell in lots. See Trustee Act, 1893, s. 13. Sale in lots.

Trustees may fix a reserved bidding : *Re Peyton's Settlement*, 1861, 30 Beav. 252. And it would seem that it is their duty to do so : *Bramley v. Alt*, 1798, 3 Ves. at p. 628 ; and *Campbell v. Walker*, 1800, 5 Ves. at p. 680. Trustees may buy in, if by the conditions they reserve the right to bid : Trustee Act, 1893, s. 13. Reserved
bidding.

Trustees may not join in selling with other persons unless they can thereby secure a higher price. Sometimes it is obvious, and requires no proof, that the joint sale is beneficial ; as in the case of a house belonging to trustees and a garden and forecourt belonging to somebody else ; or a divided portion of a house belonging to trustees and the rest of the house to somebody else ; or where the trustees are the owners of a piece of land in the centre of a park or pleasure ground, or a piece in the centre of a courtyard, or of an undivided share of land, or are the owners of a life interest or a reversion : see *Cooper and Allen*, 1876, 4 Ch. D. at p. 816. Where it is not obvious that a joint sale is Joint sale.

beneficial, the evidence of a competent person (*e.g.* a surveyor) to that effect will be required. Jessel, M. R., in *Cooper and Allen*, at p. 820, says if the trustee got the opinions of three valuers he might act upon them. But it is probably not necessary to have so many as three.

Trustees selling jointly with others must take care to have the purchase money apportioned before the completion of the purchase, because it is their duty to take care to receive their proper share of the purchase money. If the trustees take proper advice as to the share of the purchase money to which they are entitled, and, acting under that advice, apportion the purchase money, the *cestuis que trust* cannot complain that the property has been sold at an undervalue, even though they obtain the opinion of other valuers that the trustees ought to have received a larger share of the purchase money. And even if the apportionment has not been made in a fair and reasonable manner, so that as between the trustee and the *cestuis que trust* it may be impeached, the purchaser is safe unless he has notice : *Cooper and Allen*, 1876, 4 Ch. D. at pp. 816, 818.

The proper way to apportion the purchase money between a life estate and a reversion is to value both the life estate and the reversion, and divide the actual price in the proportion of the value of the life estate and reversion. This is clear, because the two sold together fetch more than if sold separately ; if then the life estate is first valued, and the value so found is deducted from the purchase money and the residue treated as the value of the reversion, an advantage is given to the reversioner, who receives all the increase in the value of the two interests arising from the fact that they are sold jointly instead of separately : *Cooper and Allen*, at p. 807.

It is not necessary that the purchaser should be informed by the particulars or conditions of sale how the purchase money will be apportioned. If a proper apportionment is made before the completion of the sale, that is soon enough : see *Cooper and Allen*, 1876, 4 Ch. D. at p. 819. Jessel, M. R., there disapproved of the remarks in *Rede v. Oakes*, 1864, 4 D. J. & S. at p. 514, where Turner, L. J., asked, "Do the terms of the contract furnish the means of ascertaining upon any fair and reasonable

basis the proportion of the proceeds of the sale which ought to be attributed to the trust properties ? ” In *Morris v. Debenham*, 1876, 2 Ch. D. 540, Malins, V.-C., also expressed doubt as to *Rede v. Oakes*.

Where, on a sale by the Court, trustees of two properties held by them upon trust for sale, one under a will and the other under the testator's settlement, sold the two together without apportioning the purchase money, the purchaser's objection that the two properties ought not to have been sold together for a lump sum was overruled ; but by the indulgence of the Court provision was made for apportioning the purchase money in *Chambers : Cavendish v. Cavendish*, 1875, 10 Ch. 319.

Sale of two properties by same trustees.

Trustees are not liable to their beneficiaries if the deposit is paid to the auctioneer and embezzled by him : *Edmonds v. Peake*, 1843, 7 Beav. 239.

Deposit.

Trustees, unless expressly authorised so to do, may not sell the land without the timber, or the timber without the land (*Cholmeley v. Paxton*, 1825, 3 Bing. at p. 213), or the surface without the minerals : *Buckley v. Howell*, 1861, 29 Beav. 546. But the minerals may be reserved or sold separately under the Settled Estates Act, 1877, s. 19, or the Settled Land Act, 1882, s. 17. And minerals or surface may be sold separately with the sanction of the Court : *Trustee Act*, 1893, s. 44.

Timber and minerals.

Trustees ought not to sell under an open contract : *John v. Jones*, 1876, 34 L. T. 570, but they need not exclude the Vendor and Purchaser Act, 1874, s. 2 (see sect. 3 of that Act), or the Conveyancing Act, 1881, s. 3 (see sect. 66 of that Act). They may employ such special conditions as to title or other matters as they think fit : 23 & 24 Vict. c. 145, s. 2 ; *Trustee Act*, 1893, s. 13. But they must exercise their discretion in a reasonable and proper manner : *Dunn v. Flood*, 1885, 28 Ch. D. 586.

Conditions of sale used by trustees.

Trustees must not rashly or improvidently introduce a depreciatory condition for which there is no necessity. And, under the old law, if such a condition was introduced, the *cestuis que trust* might restrain the sale : *Dance v. Goldingham*, 1873, 8 Ch. 902. But now, under the *Trustee Act*, 1893, s. 14 :

Depreciatory conditions.

“(1.) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to

which the sale was made may have been unnecessarily depreciatory, unless it appears that the consideration for the sale was thereby rendered inadequate.

“(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with such trustee at the time when the contract for sale was made.

“(3.) No purchaser upon any sale made by a trustee shall be at liberty to make any objection against the title upon the ground aforesaid.”

Sales by trustees may still be impeached by the *cestui que trust* on the ground of depreciatory conditions: (1) as against the purchaser (*a*) before the execution of the conveyance, by showing that the use of depreciatory conditions has made the property sell for less than its real value, (*b*) before or after the execution of the conveyance, by showing collusion between the trustee and the purchaser at the time of the contract; and (2) as against the trustee, by showing that the use of depreciatory conditions made the property sell for less than its real value, or by showing fraud or collusion between the trustee and the purchaser at the time of the contract.

The test of a depreciatory condition is, “Would a prudent and reasonable owner selling in his own right impose such a condition?” *Falkner v. Eq. Rev. Soc.*, 1858, 4 Drew. at p. 355. The fact that the condition in question is usually inserted is not conclusive (*Dunn v. Flood*, 1885, 28 Ch. D. at p. 593), because men do not always act with carefulness and prudence. But not more than ordinary prudence is required; the trustee is not bound to show that he has exercised his discretion in the conduct of the sale in the manner most favourable to the interests of the *cestui que trust*. See *Borell v. Dann*, 1843, 2 Ha. at p. 455.

Commence-
ment of title.

Trustees ought not to cut down the length of title unless it is necessary on the ground of complications in the earlier title or on the ground of expense.

In *Rede v. Oakes*, 1864, 4 D. J. & S. 513, it was considered doubtful whether a condition that as to part of the property

(not specifying that the part was only a small portion of the whole, and not essential to the enjoyment of the rest of the property) a seventeen years' title should be accepted, was depreciatory or not.

A condition on a sale made in 1855 that the abstract of title should commence with a conveyance from E. B., dated 1840, who, in 1839, had purchased from the Board of Ordnance, is not depreciatory: *Kershaw v. Kalow*, 1855, 1 Jur. N. S. 974.

Trustees selling in 1872 gave as the root of title the conveyance to themselves, dated 1858, which was, so far as they were concerned, a voluntary deed, and stipulated that "no earlier or other title should be called for or required except at the purchaser's expense." There was a deed of 1819 which ought to have formed the root of title, but it had been lost. It was held that the condition was depreciatory, and that the trustees ought to have commenced their title with the deed of 1819, which they ought to have found, or else have procured a copy, or made the recital in the deed of 1858 evidence, and offered a statutory declaration as to possession in accordance with the title: *Dance v. Goldingham*, 1873, 8 Ch. 902.

A ten years' title is not unreasonably short if there are many lots held under the same title, and each lot is small: *Dunn v. Flood*, 1885, 28 Ch. D. 586.

On a sale by the assignees of a bankrupt, a condition that the vendors should not be required to do more than show the conveyance of the estate to themselves from the provisional assignee, was held not to be depreciatory, as the fact of the estate being in mortgage for large sums of money, very recently advanced, would explain the necessity for the condition, and prevent it from having a depreciatory effect: *Borell v. Dunn*, 1843, 2 Ha. 440.

A condition on the sale of leaseholds in lots that no objection was to be made that any lease was an under-lease, or that the premises were held on the same lease with other property, or that the same were liable for superior rents or covenants, is a depreciatory condition in the case of any lot which is held under an original lease: *Rayner's Trustees and Greenaway*, 1888,

General condition as to derivative leases.

53 L. T. 495 (where it would seem the purchaser recovered his deposit).

Condition as
to recitals.

A condition that every recital in any abstracted document shall be conclusive evidence is a depreciatory condition, unless justified by very special circumstances: *Dunn v. Flood*, 1883, 25 Ch. D. 629 (this point was not mentioned on appeal). In *Smith v. Watts*, 1858, 28 L. J. Ch. 220, such a condition was used by Mr. Hayes, the conveyancer, and no objection taken to it as depreciatory.

A condition that all recitals, statements, and conclusions in any deed fifteen years old or upwards are to be taken as proved without further evidence, is not, it would seem, depreciatory: *Kershaw v. Kalow*, 1855, 1 Jur. N. S. 974.

As to recitals twenty years old trustees may rely on the Vendor and Purchaser Act, 1874, s. 2 (2); but a condition unnecessarily making recitals, say, ten years old evidence would be depreciatory.

A condition binding the purchaser not to require evidence “of any birth, marriage, death, time of death, intestacy, heirship, survivorship, matter of pedigree, failure of issue, representation or other fact, where the same should have been stated, taken notice of, or recognised in any deed or document bearing date upwards of thirty-five years ago,” is not depreciatory: *Tanner v. Smith*, 1840, 4 Jur. at p. 312.

Condition as
to tenancies,
easements,
and quit-
rents

A general condition against tenancies, easements, and quit-rents was held depreciatory under the following circumstances. Land was sold in lots for building. There was a condition that the property was sold “subject to the existing tenancies, restrictive covenants, easements, quit-rents, and other incidents of tenure (if any),” and that “the several purchasers should covenant to perform the restrictive covenants comprised in abstracted documents, and to indemnify the vendors against the consequences of the breach of any such covenants.” The sale was also made subject to certain “general conditions” restricting the user of the property. The abstracted documents contained no other restrictive covenants than those set out in the “general conditions.” There were no tenancies, easements, or other covenants affecting the property. There was no con-

dition allowing compensation : *Dunn v. Flood*, 1885, 28 Ch. D. 586.

A condition that "the purchaser shall not require any evidence of identity as to the parcels contained in the deeds of 1839 and 1840" (*i.e.* dated fifteen years before the sale), "corresponding with the description in the particulars of the property now sold," was held under special circumstances not to be depreciatory : *Kershaw v. Kalow*, 1855, 1 Jur. N. S. 974. In that case the greater part of the land had been covered over with cottages since 1840, and the mortgagor himself, who was moving for an injunction to restrain the sale, had since the mortgage disputed whether the mortgage included the front gardens, through which alone access could be had to the cottages.

A condition allowing compensation is, it seems, a proper condition for trustees to employ. In *Dunn v. Flood*, 1885, 28 Ch. D. 586, Baggallay, L. J., speaks of a condition for compensation as being usual (see p. 591), and so far from such a condition being improper on a sale by trustees, all three Judges in the Court of Appeal treated the absence of a condition for compensation as tending to make the other special conditions depreciatory.

However, although the condition is not improper or depreciatory, it does not follow that the Court will enforce it literally. If the misdescription for which compensation is sought was caused by negligence (*i.e.* the want of the ordinary care of a prudent owner), completion of the sale with compensation would be a breach of trust. In such a case the Court would, no doubt, at the instance of the *cestui que trust*, set aside the sale unless the purchaser paid the full purchase money, or at any rate the full value of the property. And even if the purchaser chose to risk an action by the *cestui que trust*, the Court would not consent to further a breach of trust by allowing the trustees to give compensation, so as to reduce the purchase money below the real value of the property.

There are, indeed, some expressions in *White v. Cuddon*, 1842, 8 Cl. & F. 766, which seem to show that trustees never can give compensation. See above, p. 105. But it seems more correct to say that even where the misdescription is caused by the

trustees' negligence the Court will give effect to the condition allowing compensation, to the extent of reducing the purchase money to the real value of the land at the date of the contract. Thus, in *Re Chifferiel*, 1888, 40 Ch. D. 45, which was the case of a sale by trustees under the direction of the Court, it was held that the purchaser was entitled to the difference between the actual value at the date of the sale and the price paid. Perhaps the more correct course would be to ascertain the amount of compensation for the misdescription, and then to reduce the purchase money by that amount; provided that the sum eventually paid by the purchaser should not be less than the actual value of the land at the date of the sale. If the trustees have allowed compensation for an error caused by their negligence the *cestuis que trust* will be entitled to damages: see *Tomlin v. Luce*, 43 Ch. D. 191, stated above, p. 106. If the misdescription is not caused by negligence, but by a slip or accident, such as could not have been avoided by a prudent owner exercising ordinary care, the Court would probably give effect to the condition for compensation.

Rescission. Trustees may employ a condition enabling them to annul the sale if the purchaser insists on requisitions which the vendor cannot comply with (*Falkner v. Eq. Rev. Soc.*, 1858, 4 Drew. 352, a sale by a mortgagee), or which the vendor is unable or unwilling to comply with: *Tanner v. Smith*, 1840, 4 Jur. at p. 312.

Condition for re-sale. On a sale by trustees, with a condition enabling them to re-sell in case of the purchaser's default, and recover the deficiency and expenses against the defaulting purchaser, the neglect to enforce the condition is not necessarily a breach of trust: *Thomson v. Christie*, 1852, 1 Macq. 236.

Conveyance. A trustee may stipulate that the purchaser shall not require any other person than the vendor to join in the conveyance: *Hobson v. Bell*, 1839, 2 Beav. 17 (sale by a mortgagee).

A trustee who has no power to give receipts may stipulate that his receipt shall be a sufficient discharge for the purchase money, and that the purchaser shall not require the concurrence of the *cestui que trust*: *Groom v. Booth*, 1853, 1 Drew. 548.

A trustee may stipulate that he shall only covenant that he has not incumbered.

On a sale in lots of leaseholds held under one lease, trustees for sale may sell with a condition that, if all the lots are sold, the purchaser of the largest lot shall take an assignment of the whole, executing under-leases to the other purchasers, but that if any lot remains unsold the vendors will grant to the purchasers of the lots sold under-leases of their respective lots: *Judd and Poland*, (1906) 1 Ch. 684. And they may sell with a condition that all the lots sold shall, if sold to different purchasers, be so under-leased: per Romer, L. J., and Cozens-Hardy, L. J., *ibid.*; overruling *Walker and Oakshott*, (1901) 2 Ch. 383.

On a sale of leaseholds, trustees who took by assignment ought not to stipulate for a covenant of indemnity by the purchaser: see *Wilkins v. Fry*, 1816, 1 Mer. at p. 268.

See, further, as to the form of the conveyance, pp. 376 to 396.

On a sale in lots, trustees may sell subject to a condition imposing restrictions as to building: *Mackenzie v. Childers*, 1889, 43 Ch. D. 265.

Trustees in describing the property must take care not to make any untrue statement tending to depreciate its value, or omit any matter tending to increase its value. Particulars
of sale.

On the sale of a reversion the mortgagee described the life tenant as aged "thirty years or thereabouts." This was held by Lord Cottenham, reversing Knight-Bruce, V.-C., not to be so loose a description as to make the sale a breach of trust: *Jones v. Matthie*, 1847, 16 L. J. Ch. 405.

On the sale of a manor, the omission to insert manorial rights of no more than nominal value, or the right to quit-rents of small amount, to which the title of the *cestui que trust* was not clear, was not held to make the sale a breach of trust: *Borell v. Dann*, 1843, 2 Ha. 440.

The assignee of an insolvent debtor selling the bankrupt's life estate in land omitted to mention that it was unimpeachable for waste, the fact being that all the timber of any value had been felled, and there were no mines on the property, so that the value of the privilege of committing waste had become merely nominal. The sale was attacked by the bankrupt, but it was held that the misdescription was not a breach of trust: *Borell v. Dann*, *ubi sup.*

Joint sale.

If trustees sell jointly with other vendors, they must take care that depreciatory conditions necessary for one property, but not for the other, are restricted in their application to that property which requires them. Thus, if the trust property has a long title, and the other property a short title, it must distinctly appear that the condition limiting the short title is confined to the other property; otherwise the condition would be depreciatory as regards the trust property: *Rede v. Oakes*, 1864, 4 D. J. & S. at p. 515.

2. Sale by Mortgagees

A mortgagee is bound to exercise his power of sale in good faith; he must not, either fraudulently, or wilfully, or recklessly, sacrifice the property of the mortgagor: *Kennedy v. De Trafford*, (1897) A. C. 180. But although he is sometimes called a trustee, the fiduciary character of a mortgagee is only secondary, the power of sale being given to him for his own benefit to enable him the better to realise his debt: *Cholmondeley v. Clinton*, 1820, 2 J. & W. 1; *Robertson v. Norris*, 1858, 1 Giff. 421. The mortgagee is not bound to wait, even though by waiting a better price can be obtained: *Farrar v. Farrars, Lim.*, 1888, 40 Ch. D. 395. In the absence of fraud or collusion, the Court will not interfere with a disadvantageous sale by a mortgagee: *Warner v. Jacob*, 1882, 20 Ch. D. 220.

The writer is not aware of any case in which the Court actually has interfered with a sale by a mortgagee merely on the ground of his improvidence. But it seems to be taken for granted in the reported cases in which depreciatory conditions have been objected to by the purchaser that the Court will, on the application of the mortgagor, set aside the sale after completion merely on the ground of improvidence: see (amongst other cases) *Falkner v. Eq. Rev. Soc.*, 1858, 4 Drew. at p. 355. And if it were otherwise, it is difficult to understand why the Court should ever listen to the purchaser's objection that his mortgagee-vendor has used depreciatory conditions. The question whether the sale should be set aside might depend on different considerations from those deciding the question whether the mortgagor can recover damages from the mortgagee for having sold improvidently.

The Court will not interfere by *injunction*, except upon the terms of the mortgagor paying into Court the sum sworn by the mortgagee to be due (*Macleod v. Jones*, 1883, 24 Ch. D. 289), unless the mortgagee is the solicitor of the mortgagor, in which case the Court will interfere to prevent oppression (*ibid.*); or unless the Court can see from the mortgage deed itself that the amount sworn to be due cannot be due : *Hickson v. Darlow*, 1883, 23 Ch. D. 690.

Mortgagees are not protected by the Trustee Act, 1893, s. 14 ; see sect. 50. They are to a certain extent protected by the Conveyancing Act, 1881, s. 19 ; but this section would probably be held not to sanction the use of a depreciatory condition for which there is no necessity : see above, p. 433.

Fixing the amount of the deposit at less than 10*l.* per cent., and accepting payment of deposit by cheque in lieu of cash, are not negligent acts on the part of a mortgagee, so as to deprive him of his costs of an abortive sale : *Farrer v. Lacy*, 1885, 31 Ch. D. 42.

A mortgagee is not bound to sell in lots : *Adams v. Scott*, 1859, 7 W. R. 213.

A mortgagee, unless expressly authorised, is not entitled to sell fixed trade machinery apart from the land : *Re Yates*, 38 Ch. D. 112. The express mention of such machinery in the conveyance does not imply that it is sold separately : *Re Brooke*, (1894) 2 Ch. 600. So, too, a mortgagee of a house is not entitled to sell the mantelpieces or other fixtures separately (per Bowen, L. J., in *Re Yates, ubi sup.*, at p. 128), or to sell the house in flats : per Cotton, L. J., *ibid.* p. 121. Timber cannot be sold separately, nor minerals, except with the sanction of the Court : see above, p. 433, and sect. 3 of the Trustee Act, 1893, Amendment Act, 1894.

On a sale by a mortgagee part of the purchase money may be allowed to remain on mortgage, provided that the mortgagee keeps the sale and mortgage distinct, and submits to be charged with the whole of the purchase money : *Davey v. Durrant*, 1857, 1 De G. & J. 535 ; *Thurlow v. Mackeson*, 1868, L. R. 4 Q. B. 97.

See, further, as to mortgagees selling, Farrar, p. 12.

CHAPTER XXXI

PARTICULARS AND CONDITIONS ON A SALE BY THE COURT

WHEN a sale is ordered by the Court or a Judge, the sale may be ordered to be carried out either (1) by laying proposals before the Judge in chambers for his sanction, or (2) by proceedings altogether out of Court, and in the second case the purchase money may be ordered to be paid into Court or to trustees, or otherwise dealt with as the Judge in chambers may order : see R. S. C. Ord. LI. r. 1*a*. The first mode of sale is that dealt with in this chapter, and is briefly styled “a sale by the Court.”

On a sale by the Court, the particulars of sale are prepared by the solicitor of the party having the conduct of the sale, and settled at chambers. They must be intituled in the action or matter, and must state that the sale is made with the approbation of the Judge under a judgment or order : Dan. Ch. Pr. 876.

“Before any estate or interest shall be put up for sale under a judgment or order, an abstract of the title shall, unless otherwise ordered, be laid before some conveyancing counsel, approved by the Court or Judge, for his opinion thereon, to enable proper directions to be given respecting the conditions of sale and other matters connected with the sale. The conditions of sale shall specify a time for the delivery of the abstract of title to the purchaser or to a solicitor ” : Ord. LI. r. 2.

The Court has, under this rule, discretion to direct the sale to be made without laying the abstract before a conveyancing counsel : *Gibson v. Woollard*, 1854, 5 D. M. & G. 835. The smallness of the property involved would be a reason for the Court dispensing with a reference to the conveyancing counsel. See *Chamberlain v. C.*, 1853, 1 Sm. & G. App. xxviii. (a petition for the settlement of 300*l.*). Probably, in the case of small proper-

ties, the sale will now be generally made out of Court under Ord. LI. r. 1a.

The particulars and conditions are finally settled at chambers (Dan. Ch. Pr. p. 878), and printed. See Ord. LI. r. 5.

There are certain conditions which are generally used in sales by the Court. See R. S. C. App. L. No. 15.

In the preparation of the conditions of sale the conveyancing counsel to the Court is the agent of the vendor, and the vendor is responsible for misrepresentations made by him : *Re Banister*, 1879, 12 Ch. D. at p. 141. Vendor's responsibility.

At least as much good faith is required as in ordinary sales, perhaps more : *Ibid.* In *Else v. Else*, 1872, 13 Eq. 196, and *Re Arnold*, 1880, 14 Ch. D. 273, it is said that greater good faith and greater accuracy are necessary in a sale by the Court than in a sale out of Court. *Bona fides.*

The Court will not attempt to sell property with an absolutely bad title : *Bennett v. Wheeler*, 1838, 1 Ir. Eq. R. 18.

Where the conditions precluded the purchaser from inquiring into the prior title, and made the recitals conclusive evidence, the purchaser was discharged from the purchase on its appearing that one of the recitals had been framed so as to conceal a defect in the prior title : *Else v. Else*, 1872, 13 Eq. 196.

A condition enabling the vendor to rescind with the leave of the Judge, repaying the deposit but no costs, may be inserted on a sale by the Court : *Powell v. Powell*, 1875, 19 Eq. 423. But such a condition does not enable the vendor to escape payment of the purchaser's costs, where the vendor insists throughout that the purchaser must complete and gives no notice of rescission : *Ibid.* Even if the vendor gives notice to rescind under the condition, the purchaser, if he is entitled to be discharged on the ground of the vendor's misrepresentation, recovers, notwithstanding the condition, his costs of investigating title and of his application to be discharged and also the costs occasioned by his bidding for and becoming the purchaser of the property : *Hollivell v. Seacombe*, (1906) 1 Ch. 426. See also *Powell v. Powell*, *ubi sup.*, and *M'Culloch v. Gregory*, 1855, 1 K. & J. 286. The form of the condition usually is, "The vendor, with the sanction of the Judge, shall be at liberty to Condition for rescission.

rescind upon such terms as the Judge shall approve"; but this does not entitle the purchaser to discuss the terms on which the notice is to be given—that concerns only the Judge and the vendors and the parties beneficially entitled to the property : *Hollivell v. Seacombe*, (1906) 1 Ch. at p. 434.

Lessor's title.

On the sale (in 1843) of a lease for lives, renewable for ever (dated 1794), the Court allowed a condition relieving the vendor of the duty of producing the lessor's title, but would not allow a condition requiring the purchaser to admit the lessor's title, or precluding him from investigating the lessor's title : *Lahey v. Bell*, 1843, 6 Ir. Eq. R. 122.

Leaseholds in lots.

Where leasehold property is sold in lots the usual course on a sale by the Court is for the purchaser of the largest lot to take an assignment of the whole lease himself, and to make underleases to the purchasers of the other lots. And it is in such cases usual to introduce a stipulation that the purchaser of the largest lot, who will be the lessor with relation to the purchasers of the other lots, shall give the same covenants as the owner of the leasehold property would ordinarily enter into with sublessees against all loss which they might sustain by reason of the non-payment of rent or non-performance of covenants contained in the original lease : per Kindersley, V.-C., in *Browne v. Paull*, 1856, 26 L. T. o.s. 232.

As to the form of the conveyance where there is a condition that in case of disputes it shall be "settled by the Judge," see above, p. 378.

As to the form of the conveyance where there are first mortgagees who concur, and puisne incumbrancers who are not parties, but are, under sect. 70 of the Conveyancing Act, bound by the order of the Court, see above, p. 383.

Completion.

If the purchaser does not complete on the day fixed, the usual practice is to order him to lodge in Court the purchase money and interest, and on such lodgment being made he is to be let into possession. The purchaser is not entitled to have words inserted in the Order enabling him to set off the rents and profits against the interest : *Re Smith ; Day v. Bonaini*, 1886, 55 L. T. 329. But the purchaser is entitled, if a receiver was appointed by the Court, to have inserted a direction to the

receiver to account for the rents and hand them over to the purchaser: *Ibid.*

Two properties held on different trusts may be sold in one lot ; the Court will see that the money comes to the right hands : *Cavendish v. Cavendish*, 1875, 10 Ch. 319 (where by indulgence to the purchaser the purchase money was apportioned and paid to separate accounts).

Two
properties
in one lot.

PART III

CHAPTER XXXII

THE MEMORANDUM

Statute of
Frauds,
s. 4.

“ No action shall be brought whereby to charge any person upon any agreement made upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised ” : Statute of Frauds (29 Car. 2, c. 3), s. 4 (leaving out immaterial words).

Auction.

A sale of land by auction is within the Statute of Frauds, and the vendor is not bound unless he or his agent (who may be the auctioneer or his clerk) signs the agreement or memorandum : *Buckmaster v. Harrop*, 1807, 13 Ves. 456. But if the vendor refuses to enter into an agreement for sale with the highest bidder, who complies with the conditions of sale, he is liable in damages : *Johnston v. Boyes*, (1899) 2 Ch. 73 ; see above, p. 169.

Building
materials.

A sale of the materials of a standing building, to be taken away by the purchaser, is within the statute : *Lavery v. Purssell*, 1888, 39 Ch. D. 508.

Sale by Court.

The statute does not apply to sales by the Court (*Att.-Gen. v. Day*, 1748, 1 Ves. sen. 218) ; but applies to sales in bankruptcy : *Ex parte Cutts*, 1838, 3 Deac. at p. 267.

Signature by
defendant
alone.

It is not necessary that the person suing for specific performance should have signed the agreement ; it is sufficient if the defendant has signed it : *Scton v. Slade*, 1802, 7 Ves. 274.

Signature by initials only is not binding : *Sweet v. Lee*, 1841, 3 Man. & G. 452. Form of signature.

A memorandum of agreement in the writing of the person to be charged, and containing his name as a party to the agreement, is sufficient, although the name is not subscribed (*Bleakley v. Smith*, 1840, 11 Sim. 150) ; and although the name itself is not written, but only printed at the head of the paper : *Tourret v. Cripps*, 1879, 48 L. J. Ch. 567.

A telegram signed by the telegraph clerk would seem to be sufficient if the vendor has signed the instructions for the message : *Godwin v. Francis*, 1870, L. R. 5 C. P. 295. And the signature by the telegraph clerk, if done with the authority of the vendor, would be enough without the signature of the vendor to the instructions : *semble, ibid.* p. 302.

Signature in the body of the agreement is sufficient : *Knight v. Crockford*, 1794, 1 Esp. 190.

A signature written with a pencil is sufficient : *Lucas v. James*, 1849, 7 Ha. at p. 419.

A stamped signature is sufficient : *Schneider v. Norris*, 1814, 2 M. & S. 286 ; *Bennett v. Brumfitt*, 1867, L. R. 3 C. P. 28.

A printed signature is sufficient " if a man be in the habit of printing his name " (per Lord Eldon, in *Saunderson v. Jackson*, 1800, 2 B. & P. 238) ; or if the person whose name is printed fills in the rest of the agreement himself, or otherwise recognises the name as having been printed by his authority (*Schneider v. Norris*, 1814, 2 M. & S. 286) ; even though the printed name be at the top or otherwise than at the end of the agreement : *Tourret v. Cripps*, 1879, 48 L. J. Ch. 567. But the printing of the auctioneer's name outside the conditions is not a signature : *Dyas v. Stafford*, 1882, 9 L. R. Ir. 520. And a letter, written by the purchaser, on which the vendor's name is printed is not a signature by the vendor : *Hucklesby v. Hook*, (1900) W. N. 45.

The auctioneer is by implication an agent lawfully authorised to sign the memorandum on behalf of the vendor ; the authority being given by the appointment as auctioneer. See Sug. 147. After the hammer is down, the authority to sign cannot be revoked by the vendor : per Romilly, M. R., in *Day v.* Auctioneer signing as agent for vendor.

Wells, 1861, 30 Beav. 220. It is submitted that the purchaser has no remedy against the auctioneer for not signing on behalf of the vendor.

as agent for
purchaser.

The auctioneer is also, after the hammer is down, the agent of the purchaser for signing the memorandum in virtue of the implied authority given by the act of bidding: *Emmerson v. Heelis*, 1809, 2 Taunt. 38: see remarks on that case and on conflicting authorities in *Glengal v. Barnard*, 1836, 1 Keen, at p. 788. See, too, *Kemeys v. Proctor*, 1820, 3 Ves. & B. 57; 1 J. & W. 350. The signature by the auctioneer must be made at the time; and, if not so made, the implied authority may be revoked by the purchaser: *Bell v. Balls*, (1897) 1 Ch. 663. See, too, *Buckmaster v. Harrop*, 1807, 13 Ves. 456.

The fact of the auctioneer being also the vendor (though only selling as a trustee) makes the Court scrutinise the fact of signature closely. See *Buckmaster v. Harrop*, *ubi sup.* According to *Farebrother v. Simmons*, 1822, 5 B. & Ald. 333 (a decision on sect. 17 of the Statute of Frauds), the auctioneer, if he is also the vendor, cannot be the agent of the purchaser for the purpose of signing, because the Legislature contemplated as agent a third party and not the party suing. This decision was doubted in *Bird v. Boulter*, 1833, 1 Nev. & M. at p. 316, but it was recognised as settled in *Sharman v. Brandt*, 1871, L. R. 6 Q. B. 720 (a sale by a broker, not by auction).

Clerk signing
as agent for
vendor,

The auctioneer's clerk has, in general, no authority to sign on behalf of the vendor (*Coles v. Trecothick*, 1804, 9 Ves. 234), but special circumstances may be proved showing that the vendor assented to the signature by the clerk, as where the auctioneer told the vendor that he was in the habit of allowing his clerks to sign contracts: *Ibid.* Probably at a sale by auction, the vendor standing by whilst the clerk signed would by his silence confer authority on the clerk to sign.

A receipt signed three days after the auction by the auctioneer's clerk on behalf of the auctioneer, acknowledging that he had "received from Mr. Dyas 30*l.* sterling, which, with 20*l.* paid 10th August, makes 50*l.* deposit on his purchase, lot 4, Mr. John Stafford's property," and a letter by the vendor's solicitor, headed "Stafford to Dyas," and referring to the purchase,

were held insufficient to bind the vendor : *Dyas v. Stafford*, 1882, 9 L. R. Ir. 520.

The auctioneer's clerk has not by general custom any authority to sign on behalf of the purchaser : *Bell v. Balls*, (1897) 1 Ch. 663 (on sect. 4) ; *Peirce v. Corf*, 1874, L. R. 9 Q. B. 210 (on sect. 17). But if the purchaser nods or otherwise signifies his assent, this will be sufficient authority : *Bird v. Boulter*, 1833, 1 Nev. & M. 313. Where the auctioneer's clerk in the purchaser's presence filled up the blanks in the printed memorandum attached to the conditions of sale by inserting the purchaser's name and address, but did not otherwise sign, and the purchaser himself did not sign on the ground that he could not then pay the deposit, and an appointment was made for the purchaser to sign and pay the deposit, which appointment the purchaser did not keep, it was held that the memorandum was sufficiently signed on the purchaser's behalf : *Sims v. Landray*, (1894) 2 Ch. 318.

as agent for
purchaser.

Signature by the auctioneer's clerk, otherwise than in the purchaser's presence, would probably be insufficient unless express authority had been given. See *Henderson v. Barnewall*, 1827, 1 Y. & J. 387 (not sale by auction).

But an auctioneer's clerk is a " third party " within the above rule, and signature by him, if he is otherwise duly authorised by the purchaser, will not be bad merely because the auctioneer is the vendor : *Bird v. Boulter*, 1833, 1 Nev. & M. 313.

The want of a signed contract cannot be supplied by a draft agreement afterwards sent by the defendant's solicitor with a letter signed by the defendant's solicitor stating the terms ; the solicitor was only authorised to *prepare* an agreement, not to sign one : *Smith v. Webster*, 1876, 3 Ch. D. 49. What renders the solicitor's signature insufficient is the fact that he had no authority to sign, not the fact that he signed *alio intuitu* : *Jones v. Victoria Dock Co.*, 1877, 2 Q. B. D. 314. And if an agent signs and is authorised to sign a letter recognising an unsigned document as containing the terms of a contract made by his principal, even though he is not authorised to sign the letter as a record of the contract, this is a sufficient memorandum :

Solicitor-

John Griffith Cycle, &c. v. Humber, &c., (1899) 2 Q. B. 414. See, further, Dart, p. 259.

Essential
matters.

The essential matters of the agreement must be stated in writing in order to satisfy the Statute of Frauds. The essential matters are (1) the names of the parties; (2) the property sold; (3) the price, (4) the date, and also (*qu.?*) (5) the conditions of sale (if any), and reservations over the property and undertakings by the vendor.

(1) *Names of the Parties*

Parties.

Both the vendor and the purchaser must be named or sufficiently described in the memorandum itself, or in the particulars or conditions to which the memorandum is annexed: *Williams v. Lake*, 1859, 2 E. & E. 349. The transposition of the vendor's Christian names does not make the memorandum insufficient: *Van Praagh v. Everidge*, (1902) 2 Ch. at p. 270.

And they must be named as vendor and purchaser respectively, or the names must occur in such a way as to raise the inference that they are vendor and purchaser.

A receipt signed by the vendor, and in the following form, "Received from E. T. Hooley the sum of one hundred, being deposit on all my property, Market Place, sold for 2,000*l.*, complete Christmas, 1887," was held to be sufficient, although it did not state expressly that E. T. Hooley was the purchaser: *Smith v. Brentnell*, (1888) W. N. 69.

If the purchaser's offer is contained in a letter, addressed on the face of it to the vendor or to the agent of an undisclosed vendor, this is a sufficient naming of the vendor: *Filby v. Hounsell*, (1896) 2 Ch. 737. As to a letter, not addressed on the face of it to the vendor, but enclosed in an envelope addressed to him, see below, p. 455.

If the memorandum contains words negating the inference that the person named is vendor or purchaser, the Statute of Frauds has not been complied with. Thus, where the person who signed the memorandum was the vendor, but was described as "solicitor for the vendor," this was held an insufficient mention of his name: *Jarrett v. Hunter*, 1886, 34 Ch. D. 182.

So, where the agent signs "as agent for the vendor," or other words are used negating his personal liability, then,

unless the vendor himself is named or sufficiently described, the memorandum is insufficient: see *Potter v. Duffield*, 1874, 18 Eq. 4.

If, however, the vendor's agent signs as vendor or in such a way as to raise the inference that he is himself the vendor, this will be a sufficient naming of the vendor, since he purports to contract as principal: see *Morris v. Wilson*, 1859, 5 Jur. N. S. 168; *Filby v. Hounsell*, (1896) 2 Ch. 737.

It is a sufficient description if the parties can be identified without the aid of evidence of the sort called by Sir J. Wigram "evidence to prove intention as an independent fact": per Lord Blackburn in *Rossiter v. Miller*, 1878, 3 App. Ca. at p. 1153, referring to Wigram on Extrinsic Evidence, Intr. Obs. p. 10. Sufficient description.

The words "confirmed on behalf of the vendor," signed by the auctioneer, do not contain a sufficient description: *Potter v. Duffield*, 1874, 18 Eq. 4. "Vendor."

A stipulation that the purchaser shall pay for the tenant right, "the landlord to be considered as an outgoing tenant," does not supply a description of the vendor, because it is possible, consistently with that stipulation, for some one other than the landlord to be selling: *Coombes v. Wilkes*, (1891) 3 Ch. 77. "Landlord."

The description of the vendor as the "client" or "friend" of the auctioneer would be insufficient: per Kay, J., in *Jarrett v. Hunter*, 1886, 34 Ch. D. 182. "Client."

The following descriptions and statements were held to be sufficient:

A statement in the particulars that the sale was made "by direction of the executors," although the executors had not yet proved the will: *Hood v. Barrington*, 1868, 6 Eq. 218. "Executors."

A statement in the conditions that "the vendor is a trustee selling under a trust for sale": *Callling v. King*, 1877, 5 Ch. D. 660. "Trustee."

A statement in the conditions that the vendor was "the legal personal representative of D.," although as a fact he was not at the time of the sale D.'s legal personal representative, but was the only person entitled to take out administration: *Towle v. Topham*, 1877, 37 L. T. 308. "Personal representative."

“ Proprietor.”
“ Owner.”

Where the auctioneer signed merely on behalf of “ the vendor,” but the particulars which were embodied in the contract stated that the property was put up for sale by “ the proprietor,” this was held to be sufficient : *Sale v. Lambert*, 1874, 18 Eq. 1 (doubted in *Thomas v. Brown*, 1876, 1 Q. B. D. 714). So the word “ owner ” is sufficient : *Butcher v. Nash*, 1889, 61 L. T. 72. But where the conditions by mistake stated that the vendor was a trustee for sale, this rendered the word “ owner ” insufficient : *Ibid.*

In a contract to grant a further lease to the existing lessee, a reference in the contract to the payment by him of 50*l.* was held sufficient to identify the intended lessee as the person who had paid 50*l.* : *Carr v. Lynch*, (1900) 1 Ch. 613.

“ Company.”

Where the auctioneer merely signed as “ agent for the vendors,” but the conditions embodied in the contract showed that the vendors were in possession, and that they were a company who had carried on operations on the land, and that “ the interest of the company ” would be assigned to the purchaser, it was held that the vendors were sufficiently described : *Commins v. Scott*, 1875, 20 Eq. 11.

On the other hand, “ the Court ought to be careful not to manufacture descriptions, or be astute to discover descriptions which a jury could not identify ” : per Jessel, M. R., *ibid.*

Reference
to other
document.

The contents of a conveyance referred to in the conditions cannot be imported into the contract for the purpose of showing who is the vendor : per Kay, J., in *Jarrett v. Hunter*, 1886, 34 Ch. D. 182. It seems to have been held by Romilly, M. R., in *Bourdillon v. Collins*, 1871, 24 L. T. 344, that the omission to name the vendors may be cured by naming them at the head of the abstract, if the purchaser also heads his requisitions on title with the name ; but *qu.?* see above, p. 449. The actual decision might be supported on the ground that the vendors were called “ trustees ” in the particulars.

(2) *The Property Sold*

In a sale by auction the property is usually fully described in the particulars. It is not necessary, therefore, to state here what is a sufficient description to satisfy the statute, the cases

of insufficient description being all cases of private sales, and generally by letter or other informal agreement. In a sale by auction the point which has usually to be considered is not whether the description of the property was sufficient, but whether the memorandum sufficiently refers to or incorporates the particulars of sale (as to which see below, p. 455).

It is conceivable, however, that even in a sale by auction the description contained in the particulars might be so inaccurate as to be utterly inapplicable to the property sold, in which case it might perhaps be held that the property sold was not described so as to satisfy the Statute of Frauds. In such a case the question whether the statute was satisfied would become important if the purchaser knew what was being sold, since the purchaser's knowledge would, apart from the Statute of Frauds, preclude him from objecting to the misdescription. "If the subject-matter is wrongly described, but another subject-matter is clearly in the minds of the parties, the misdescription will not preclude the vendor from his right to have specific performance": per Fry, J., in *Flood v. Pritchard*, 1879, 40 L. T. 873. If the statute, however, is not satisfied by the written contract, the purchaser's knowledge will not supply the defect: see *Jarrett v. Hunter*, 1886, 34 Ch. D. 182, stated below.

(3) *The Price*

The price must be stated. A receipt for the deposit is not sufficient unless the receipt states the amount of the purchase money, or the proportion of the deposit to the whole purchase money: *Blagden v. Bradbear*, 1806, 12 Ves. 466. But a receipt for the deposit indorsed on conditions of sale, stating that a deposit of 10 per cent. should be paid, would probably be sufficient.

A sale "at a fair valuation" would probably be held to fix the price sufficiently: see *Milnes v. Gery*, 1807, 14 Ves. 400.

(4) *The Date*

The date has been held to be essential. At any rate, where the sale took place on the 18th of November and the contract was dated the 17th of October, it was held that there was no sufficient memorandum within the Statute of Frauds: *Van*

Praagh v. Everidge, (1903) 1 Ch. 434 (a decision of the Court of Appeal ; but *qu. ?*).

(5) *Other Essentials*

But for authority, it might have been thought that a memorandum containing the names of the vendor and purchaser, or description of the property and the price, was a sufficient memorandum or note within the Statute of Frauds.

But in *Rishton v. Whatmore*, 1878, 8 Ch. D. 467, Hall, V.-C., decided that an entry by the auctioneer in his sale book of the names of the vendor and purchaser, the subject-matter of the contract, and the amount of the purchase money, omitting all reference to the conditions of sale, was not a sufficient memorandum within sect. 4, because it did not contain all the essential terms of the contract. On the same reasoning, the reservation of rights over the property and all other material terms of the contract ought to be mentioned either in the memorandum or in the writing annexed to it or referred to by it.

So, in cases under sect. 17 (now Sale of Goods Act, 1893, s. 4), an entry by the auctioneer on the catalogue of sale of the purchaser's name, the quantity of the goods, and the price, is not a sufficient memorandum where the sale is made subject to conditions of sale which are neither annexed nor referred to in the catalogue or the auctioneer's entry thereon : *Hinde v. Whitehouse* (*dictum*), 1806, 7 East, 558 ; *Kenworthy v. Schofield* (decision), 1824, 2 B. & C. 945.

A memorandum, that a partner "agrees to withdraw from the firm of G. S. and B." in consideration of the payment mentioned in the memorandum, has been held to be sufficient, as it meant that the partner should retire at once and should assign his share of the partnership assets (which included land) and be indemnified against the liabilities of the firm : *Gray v. Smith*, 1889, 43 Ch. D. 208.

Some remarks of Jessel, M. R., and Baggallay, L. J., in *Shardlow v. Cotterell*, 1881, 20 Ch. D. 90, seem to favour the view that it is not necessary that the conditions should be referred to in the memorandum. They considered that a receipt signed by the auctioneer for the deposit, and mentioning the vendor's

name and that of the purchaser, and referring to the property sold as "property purchased at the Sun Inn, Pinxton," on a certain date, was a sufficient memorandum in itself, without having recourse to the conditions of sale, which were not annexed or referred to in the receipt. But these remarks were only *dicta*, as the Court held that the receipt sufficiently referred to the conditions of sale to incorporate them, and the case of *Rishton v. Whatmore*, 1878, 8 Ch. D. 467, was not mentioned.

There certainly seems no reason for requiring all the terms of the contract to be stated (or incorporated by reference) in the memorandum or note. The fraud of the party seeking to enforce a memorandum which does not contain all the essential terms of the contract is sufficiently baffled by the admission of parol evidence on behalf of the defendant to show that the memorandum did not contain all the terms of the agreement.

Parol evidence is admissible to connect two documents embodying the terms of the contract, where one is referred to in the other: *Clinan v. Cooke*, 1802, 1 Sch. & L. at p. 33; *Hodges v. Horsfall*, 1829, 1 Russ. & M. 116. The Courts have been astute to find a connection between two such documents, even if there is no direct reference in one to the other. Thus, a letter beginning "Dear Sir," and signed by the defendant and containing all material terms except the name of the plaintiff, was held to be incorporated with its envelope addressed to the plaintiff: *Pearce v. Gardner*, (1897) 1 Q. B. 688.

Two documents connected.

Similarly, a receipt signed by the vendor's agent, "Received of L. the sum of 31*l.* as a deposit on the purchase of three plots of land at Hammersmith," was held to refer to an agreement signed by the purchaser, and containing a stipulation fixing the date for completion: *Long v. Millar*, 1879, 4 C. P. D. 450, Bramwell, L. J., thinking that "purchase" meant agreement to purchase, and that the agreement referred to could be identified as the written agreement signed by the purchaser. See, too, *Oliver v. Hunting*, 1890, 44 Ch. D. 205.

Conditions of sale headed "Property sale at Sun Inn, Pinxton, March 29, 1880," but containing no description of the property, with a memorandum at the foot signed by the auctioneer, "The property duly sold to S. and deposit paid at close of sale,"

together with a separate but contemporary receipt dated and signed by the auctioneer, for a sum “received of Mr. S., as deposit on property purchased at 420*l.*, Sun Inn, Pinxton, on above date, Mr. C., owner,” were held to be connected together by virtue of the word “purchased” in the receipt : *Shardlow v. Cotterell*, 1881, 20 Ch. D. 90.

The words “the land is sold subject to the conditions of the Halifax Incorporated Law Society” are sufficient to incorporate the conditions sanctioned by that society at the time of making the contract ; what those conditions are is a fact which must be proved by proper evidence : *Pickles v. Sutcliffe*, (1902) W. N. 200.

If an agreement refers to a plan as an existing document, parol evidence is admissible for the purpose of identifying the plan : *Hodges v. Horsfall*, 1829, 1 Russ. & My. 116.

Under
sect. 17.

A stricter rule of construction has obtained in the case of sales within sect. 17 : see *Peirce and Corf*, 1874, L. R. 9 Q. B. 210.

Purchaser’s knowledge of fact omitted in the Written Contract

Purchaser’s
knowledge.

A contract which cannot be enforced under the Statute of Frauds because of an omission to state an essential matter is not rendered capable of being enforced against the purchaser by the fact that the purchaser himself knew the matter at the time he entered into the contract. Thus, the omission to name the vendor is not cured by the purchaser’s knowledge : *Jarrett v. Hunter*, 1886, 34 Ch. D. 182.

Stamping

Stamp.

The memorandum of agreement must be stamped with a sixpenny stamp, unless the purchase money is under 5*l.* : Stamp Act, 1891. If one purchaser buys several lots there must be a separate stamp for each lot exceeding 5*l.* (*James v. Shore*, 1816, 1 Stark. 426) unless the purchases are consolidated into one contract. If the purchases are not consolidated and no lot exceeds 5*l.* no stamp is required although the aggregate purchase money exceeds 5*l.* : *Emmerson v. Heelis*, 1809, 2 Taunt. 38 ; *Roots v. Dormer*, 1832, 4 B. & Ad. 77.

Part Performance

Notwithstanding sect. 4 of the Statute of Frauds, the Court enforces contracts relating to land which have not been reduced to writing or properly signed, if there has been what is called “part performance” of the contract. Part performance.

In order that an act may have the effect of part performance, it must be unequivocally referable to the agreement, and the position of the parties must be unequivocally different from what it would have been had there been no agreement: *Morphett v. Jones*, 1818, 1 Sw. 171; *Dale v. Hamilton*, 1846, 5 Ha. 369.

An act “merely introductory or ancillary to the agreement, though attended with expense,” is not sufficient: *Whitbread v. Brockhurst*, 1784, 1 Bro. C. C. at p. 412.

The admission of the purchaser to possession of the property agreed to be sold is usually a sufficient act to constitute part performance: *Morphett v. Jones*, 1818, 1 Sw. 171. But it is possible for possession to be wrongfully taken (*Cole v. White*, 1767, mentioned in argument of *Whitbread v. Brockhurst*, 1784, 1 Bro. C. C. at p. 409), in which case the act would be insufficient. The mere fact that the vendor has not given his express assent to the purchaser’s taking possession does not make the act insufficient, especially if the vendor has acquiesced therein and allowed the purchaser to lay out money on the land: *Gregory v. Mighell*, 1811, 18 Ves. at p. 333. Examples of acts of part performance.

Expenditure by the purchaser on the land upon the faith of the agreement is sufficient, at any rate, if known to and acquiesced in by the vendor: *Wills v. Stradling*, 1797, 3 Ves. 378; *Gregory v. Mighell*, *ubi sup.* Building by the vendor on the land in pursuance of the agreement is not necessarily part performance: per Kekewich, J., in *Dickinson v. Barrow*, (1904) 2 Ch. at p. 343, criticising Lord Cranworth’s *dictum* in *Caton v. Caton*, 1866, 1 Ch. 137, and Kay, J.’s reference thereto in *McManus v. Cooke*, 1887, 35 Ch. D. 681. But if the purchaser visits the site and the vendor at his request makes material alterations in the building, this is part performance: *Dickinson v. Barrow*, *ubi sup.*

If there has been a very long acquiescence, slight acts of part performance are sufficient: *Blachford v. Kirkpatrick*, 1842, 6 Beav. at p. 236.

Insufficient
acts :

The following acts are insufficient to constitute part performance :

Payment of part of the purchase money (*Clinan v. Cooke*, 1802, 1 Sch. & Lef. at p. 40); and this for two reasons—first, that in another section (sect. 17) the statute expressly enacts that part payment of purchase money is sufficient to support a contract for the sale of goods ; and secondly, that money which has been paid can be recovered.

Payment of the whole of the purchase money : *Hughes v. Morris*, 1852, 2 D. M. & G. at p. 356.

Giving instructions to a solicitor to prepare the conveyance : *Clerk v. Wright*, 1737, 1 Atk. 12 ; *Cooke v. Tombs*, 1794, 2 Anst. 420.

Altering a draft conveyance, and returning it for engrossment : *Hawkins v. Holmes*, 1721, 1 P. Wms. 770 (where, however, the doctrine of part performance was not adverted to).

Executing and registering the conveyance : *Ibid.*

Going repeatedly to view the property : *Clerk v. Wright*, 1737, 1 Atk. 12.

Employing surveyors to value the timber : *Whitbread v. Brockhurst*, 1784, 1 Bro. C. C. at p. 412.

Appointing a person to measure the land (*Pembroke v. Thorpe*, 1740, 3 Sw. 437 n.) ; even if the measurement is actually made : *Ibid.* p. 442 n.

Company.

The doctrine of part performance applies to an incorporated company : *Wilson v. West Hartlepool Ry. Co.*, 1865, 2 D. J. & S. at p. 492.

Mutuality.

Where there has been an act of part performance the contract may be enforced by either party. See *Kine v. Balfe*, 1813, 2 B. & B. 343, where on an agreement for a lease not signed by the lessee the lessee took possession, and the lessor was held able to enforce the agreement.

Lots.

On a sale in lots an act of part performance in relation to one lot will not be sufficient to take the other lots out of the statute : *Buckmaster v. Harrop*, 1807, 13 Ves. at p. 474. If, however,

the purchaser in defence to the vendor's action for the specific performance of the agreement relating to the one lot, could show that the other lots were necessary to the enjoyment of the lot in question, he would not be bound to complete the sale of the single lot unless all the lots were conveyed: see *Dykes v. Blake*, 1838, 4 Bing. N. C. 463.

It would seem clear on principle that a defaulting purchaser cannot recover his deposit on the ground that there is no sufficient memorandum or note of the contract within the Statute of Frauds: see *Thomas v. Brown*, 1876, 1 Q. B. D. 714, not following *Casson v. Roberts*, 1862, 31 Beav. 613. If the purchaser could repudiate his contract and sue for his deposit on the ground that there was no sufficient memorandum, this would be making the Statute of Frauds a "weapon of offence," to use Lord Selborne's phrase in *Hussey v. Horne-Payne*, 1879, 4 App. Ca. 311. In *Thomas v. Brown, ubi sup.*, the Court laid hold of the facts (1) that the purchaser had voluntarily paid the deposit knowing of the insufficiency of the memorandum, and (2) that an abstract had been delivered and examined by the purchaser as constituting a case of waiver and as distinguishing the case from that of *Casson v. Roberts, ubi sup.* But Mellor, J., also decided the case on the principle that an action to recover the deposit, being an action for money had and received, could only succeed if the money had been paid without knowledge of the real facts—a decision which cuts at the root of *Casson v. Roberts*; and Quain, J., thought the reasons on which *Casson v. Roberts* proceeded were unsatisfactory.

If it is the vendor who is in default, then it would seem that the purchaser can recover his deposit, whether there is a contract valid under the Statute of Frauds or not: *Gosbell v. Archer*, 1835, 2 A. & E. 500; *Mooser v. Wisker*, 1871, L. R. 6 C. P. 120.

But the purchaser cannot, on the ground of the vendor's default, recover interest on his deposit or the expenses incurred by him, if there is no valid contract within the Statute of Frauds: *Mooser v. Wisker, ubi sup.*

INDEX

NOTE.—The initials P. and V. throughout stand for “Purchaser” and “Vendor,” and the abbreviation “*sp. perf.*” is used for “Specific Performance.”

ABANDONMENT

- of contract, 309, 312, 416, 417, 419.
- land may amount to repudiation, 417.
- mine by V. as unprofitable, non-disclosure of, 34.

ABATEMENT

- of purchase money, 99—122, 279—299. *And see* COMPENSATION
- rent, on contract for lease, lessor having only moiety, 100, 116.

ABROAD

- delay caused by V. going, 321.

ABSTRACT, 262—273.

- acceptance of, is waiver of essentiality of time, 308.
- commencement of, 237—244. *And see* TITLE.
- common mistake discoverable from, relief after completion, 58.
- damages for non-delivery of, 267.
- defect in title revealed by, rule of *aliunde* as to, 219.
 - not disclosed by, P. after accepting title, may object, 219.
 - P. may rescind after payment into Court, 272.
 - P. may send in requisitions after time fixed, 268.
 - requisition as to, is covered by condition for rescission, 267, 356, 359.
- delivery of, delay in, entitles P. to further time for requisitions, 268.
 - P. to rescind, when, 263, 264.
 - precludes V. from making time essential, 307.
 - P.'s liability to interest is postponed by, 319.
 - time not essential for, 263.
- error in, corrected in recital subsequently abstracted, 267.
- expense of more than one, to same P. on sale in lots, 429.
 - preparing, is borne by V., 410.
 - verifying, is recoverable as damages, 135.
- “free conveyance” does not preclude right to, 263.
- how to be compiled, 265, 410.
- imperfect, burden of proof that, is, 267.
 - effect of, on V.'s right to rescind, 267.
 - fraudulent delivery of, 356.
 - time for completion enlarged because of, 324.
 - requisitions enlarged, 268.
- neglect of P. to ask for, 264, 402.
- non-delivery of, effect of, on P.'s liability to pay interest, 324.
- of documents prior to commencement of title, 241—244.
 - lost title deeds, when evidence, 400.
 - two or more lots with common title, 429.

ABSTRACT—*continued.*

- partner buying from partner, entitled to what, 262.
- P. may require, though bound to accept conveyance, 263.
 - title, 221, 262.
- P., though not entitled to, may inspect title deeds, 263, 402.
 - waiving right to, may make requisitions, 276.
- retention of, affects P.'s right to give notice to complete, 308.
 - may amount to acceptance of title, 274.
- sufficiency of, 262—268.
- supplemental, delivery of, is waiver of right to rescind (*qu.*), 366.
 - P.'s notice, fixing time for, 305.
 - unnecessarily furnished, 314.
 - V.'s duty to deliver, 366.
- tenant in common buying entitled to what, 262.
- time for delivery of, not essential, 263.
- verification of, expense of, recoverable as damages, 135.
 - P. can insist on, though waiving requisitions, 276.
 - what title deeds V. must produce in, 399—401.
- waiver of right to rescind for delay in delivery of, 264.
- what, required, 262—267.

ACCEPTANCE OF TITLE, 273—277. *And see* REQUISITIONS.

ACCESS

- to land sold, 89, 185, 290.
- "tradesman's entrance," 5, 90.

ACCIDENTAL LOSS, 347—349.

ACCOUNT

- of profit made by V. on re-sale, P. not entitled to, 421.
- rents and profits, how taken, 341.

ACKNOWLEDGMENT

- by married woman, want of, 229.
- of right to production, 405—408. *And see* TITLE DEEDS.

ACQUIESCENCE. *And see* WAIVER.

- of V. in P.'s self-deception, 54. *And see* SILENCE.

ACREAGE,

- deficiency in, compensation for, 115.
 - condition for rescission applies, when, 362.
 - of parcels in title deeds, 252.
- detailed measurements given, 4.
- different in plan and in particulars, 27, 43.
- misdescription of, is essential, when, 85.
 - material, 73.
 - not covered by condition of identity, 252.
- mistake by V. as to, 55, 57.
- P. knowing property is not presumed to know, 69.

ACT OF BANKRUPTCY

- by V. makes title doubtful, 193, 202.
- where time essential, 311.

ACT OF GOD. *See* DETERIORATION.ACT OF PARLIAMENT. *And see* STATUTES.

- local and public, need not be mentioned, 37.
- private or local, construction of, 209.
- public and general, construction of, 205, 206, 207, 208.
- public character of local, 38.
- statement that V. would apply for, 22.

- ACTION.** *See* DAMAGES; DEPOSIT; RESCISSION; SPECIFIC PERFORMANCE.
 by adverse claimant, sp. perf. action postponed for, 190.
 of deceit, rule of *dans locum contractui*, 77.
 threatened, makes title doubtful, when, 189.
 V. not bound to bring, against adverse claimant, 191.
 for lessor's licence to assign, 398.
- ACTUARY,**
 assessment of compensation by, 110, 113—115.
- ADDITION,**
 verbal, 150—157.
- ADJOINING**
 house used as brothel, 32, 76.
 land, agreement to lay out streets on, 143.
 intention to reserve right to build on, 8, 48.
 owner's right of pre-emption, 96.
- ADMISSION**
 by V. that he cannot make a good title, 314.
- ADMITTANCE,**
 delay in obtaining, is "wilful default," 321.
 not good root of title, 238.
- ADVERSE**
 claims, 12, 38, 63, 189—191.
 holding of occupier, 313.
- ADVOWSON,**
 length of title which P. may require, 238.
 non-disclosure of charge for Queen Anne's bounty, 35.
 statement as to incumbent's age, 6.
 "voidance likely to occur soon," 18.
- AGE**
 for childbearing, presumption as to, 196.
 of incumbent, on sale of advowson, 6, 18.
 tenant for life, loosely described by mortgagee selling reversion, 439.
 misrepresented on sale of reversion, 93, 291.
- AGENT,** 64, 65.
 auctioneer when, of V. to receive deposit, 172, 173.
 to sign contract, 170, 447, 448.
 collecting rents, V.'s duty as to, 341.
 false representation by, that V. has a good title, 214.
 fraud committed by, liability of agent to P., 65.
 V. as for fraud, 64.
 ignorant, P. fraudulently referred for information to, 64.
 innocent misrepresentation by, 64.
 may complain that defect is essential to P. (his principal), 80.
 mistake by, more leniently considered than V.'s mistake, 104.
 mortgagor is not mortgagee's, to bid, 169.
 notice to P.'s, effect of, 149.
 partial owner acting as, for trustees, 106.
 person falsely pretending to be, is liable in damages, 65, 132.
 P.'s, unauthorised purchase by, 149.
 signing letter referring to contract, 449.
 subsequent ratification by principal, 314.
 unauthorised act of, 148.
 misstatement by V.'s, 29, 64, 148.
 V. falsely pretending to be, of Lord A., no relief, 76.

AGREEMENT. *See* MEMORANDUM.

- collateral verbal, damages for breach of, 145, 146, 154.
- expenses of, recoverable by P. as damages, 135.
- for building lease, time essential on sale of, 304.
- lease, P. may inquire as to dealings, with, 243.
- P. of leaseholds cannot call for, 243.
- voidable, not so described, 39, 83, 186.
- plan incorporated in, 43.
- terms of, may show misdescription to be non-essential, 79.
- to assign lease not satisfied by grant of new lease, 186.
- grant lease implies a grant of a valid lease, 186.

ALIENATION.

- covenant against, is "usual," when, 28.

ALIUNDE.

- rule of, 216—223, 239, 242, 244, 256.

ALLOWANCE

- to P. for improvements, 66, 155, 353.

ALTERATION. *See* DETERIORATION *and* IMPROVEMENTS.

- of contract, 142.
- date of completion, on sale of land and hay, 338.
- particulars and conditions, 53, 142, 148.
- property, making true description false, 8.
- false description true, 8.

ALTERNATIVE

- claim for sp. perf. or forfeiture of deposit, 424.
- time for completion, 302.

AMBIGUITY

- distinguished from misleading statement, 40.
- in conditions, 157, 160, 226.
- particulars, 11, 40—42, 67.
- cured by conditions, 42, 51, 157.
- private Act, 209.
- verbal statement by auctioneer explaining, 140.

ANCILLARY

- act is not part performance, 457.
- matters, contract may be varied by parol in, 150.
- relief, in case of rescission after completion, 155.

ANNUAL

- payment charged on one lot, 426.
- rental, 2.
- value misstated, 283.

ANNUITY.

- charged on reversion, misleading condition as to, 232.
- demand for release of, is an "objection to title," 361.
- health of life misrepresented on sale of, 69.
- life, on sale of, time is essential, 303.
- mention of, charged on the land, is notice of term of years, 248.
- redeemable, omission to describe, as, 39.
- sale of land in consideration of, form of conveyance, 393.
- solvency of grantor, 17, 35.

APPEAL

- from order of Judge as to form of conveyance, 378.

APPEARANCE

- of property, misleading, plan being correct, 44.
- notice from, negated by misrepresentation, 44.

APPOINTMENT,

- good root of title (*qu.*), 237, 242.
- suspicion of fraud, 200, 201.
- validity of, presumed, 200.

APPORTIONMENT,

- notice of, under Metr. Man. Act 1855, . . . 345.
- of paving expenses, 344—347.
 - purchase money, on joint sale, 381, 432.
 - rent and outgoings, 343.
 - rent of leaseholds sold in lots, 426.
 - rents and profits, 337.
 - tithes, expense of, 410.
 - on sale in lots, 426.

APPROPRIATION, 329—333.

- how effected, 329—331.
- making *more* interest, 332.
- notice alone is not sufficient, 329.
 - of, must be given, 331.
- payment into Court, 330.
- unnecessary, made by P., no compensation for, 332.
- waiver by P. of right to make, 333.
- where interest payable for delay “from any cause whatever,” 331.
 - P. in default, 332.

APPROVAL

- of draft, satisfies Statute of Frauds, when, 449.

ARABLE LAND,

- access to, 33, 185.

ARBITRARY

- finer, misstatement as to, 74, 118.
- unwillingness of V. to answer requisitions, 365.

ARBITRATION

- distinguished from valuation, 182.

ARRANGEMENT,

- deed of, sale by trustee of, 197.

ARREARS

- of rent received by V. after date for completion, 342.

ASSENT

- of executors, condition as to, 229.

ASSESSMENT

- of compensation, 107—122, 291.
- damages for deterioration, 351.

ASSIGNMENT,

- covenant against, is “usual,” when, 28.
- registration of previous, with lessor, 311.

ASSUMPTION,

- condition binding P. to make, 221, 383.
- W.

ATTEMPT,

- previous, to sell, V.'s denial of, 35.
- non-disclosure of, 35.

ATTESTED COPIES, 403, 408, 414, 430. *And see* COPIES.

AUCTION, 163—174. *And see* BIDDING and RESERVE.

- duty, deposit paid into Court. less. 174.
- Sale by Auction Act 1867, . . . 163, 166, 168.
- is within Statute of Frauds, 446.

AUCTIONEER,

- action against, for deposit, 173.
- by, against P. for commission, 173.
- advertising sale without authority, 171.
- authority of, to receive balance of purchase money, 316.
- deposit, 172.
- sign contract, 170, 447, 448.
- bidding to settle dispute as to bids, 165, 170.
- clerk of, authority of, to sign contract, 448, 449.
- commission, 173, 174.
- deposit embezzled by, V. liable to P., 173.
- V. not liable to his *cestui que trust*, 433.
- interpleader by, 174.
- liable for interest on deposit, when, 173.
- making mock biddings, 166.
- mistake of, in not bidding up to reserve, 56.
- in valuing timber, binds V., 55.
- paying deposit to V., or V.'s solicitor, 173.
- receiving cheque for deposit, 172.
- V.'s bid on sale "without reserve," 167.
- refusing to sell to highest bidder, 167, 169.
- sign contract, 167.
- stakeholder of deposit, when, 172, 173.
- unauthorised misrepresentation by, 29, 148.
- sale without reservation of way, 148.
- verbal statement by, as to reservation of way, 148.
- explaining ambiguity, 140.
- not heard by P., 148, 149.
- that property is not sold by plan, 43.

AUTHORITY

- of auctioneer. 29, 148, 171, 172, 316.
- P.'s agent to bid, 149.

AWARD,

- inclosure, called in conditions an exchange. 244.
- not a good root of title. 238.

BANKRUPTCY,

- act of, by V. makes title doubtful, 193, 202.
- where time essential, 311.
- concurrence of trustee in, P. requiring, 197, 380.
- sale by undischarged bankrupt, 209.
- in, bankrupt's concurrence not needed. 379.
- is within Statute of Frauds, 446.
- trustee in, giving "such title as the bankrupt had," 220.
- title commencing with assignment to himself, 435.
- selling leaseholds, cannot require indemnity, 394.
- life estate of bankrupt, 439.
- voluntary settlement voidable in, 193, 201.

- BARGAIN**,
damages for loss of, 130, 133.
- BENEFICIAL**
interest, condition that P. shall have, only, 257.
owner, executor conveying as, held to have sold as executor, 197.
- BENEFICIARY.** *See* CESTUI QUE TRUST.
- BIDDER**,
employment of, 164. *And see* PUFFER.
highest, refusing to sign memorandum, 170.
to be purchaser, 167.
- BIDDING**,
auctioneer by mistake not, 56.
auctioneer making fictitious, 166.
by square yard, 171.
condition against retracting, effect of, 171.
disputed, 165, 170.
mortgagor bidding on sale by mortgagee, 169.
no other, except P.'s and puffer's, 164.
"reserved," 165.
retracting, 170.
right of, *once*, 164.
stranger making fictitious, 169.
vendor bidding on sale "without reserve," 166, 167.
- BILL OF EXCHANGE**
for deposit, 172.
- BONA FIDES**,
necessary, if V. wishes to enforce condition as to requisitions, 272.
of tenant for life in leasing, proved orally, 195.
V. in condition binding P. to admit facts, 222, 232.
presumption as to, 197.
- BOND**,
contract to complete on V.'s executing, to make good title, 315.
- BOUNDARY**,
inference as to ownership of wall or hedge, 3.
from appearance of property, 44.
misleading statement as to, 90.
- BREACH**
of contract, damages for, 130—138. *And see* DAMAGES.
covenant, continuing, 260.
known to P., 147, 212.
V., 232, 259.
trust in leasing, 230.
V. not compelled to commit, 105.
- BRICK-BUILT**
is an essential misdescription, 89.
- BROTHEL**,
existence of, adjoining house sold, 32.
house sold used as, 32.
- BUILDING.** *And see* "BUILDING LAND."
covenant by lessee to erect, is not "usual," 28.
destruction of unsuitable, by V., 351.

BUILDING—*continued*.

- land containing, compensation for deficiency in acreage, 115.
- lease, time essential on sale of agreement for, 304.
- on mixed copyhold and freehold land, requisition as to, 253.
- removal of, omission to mention, on sale of lease, 32.
- representation that land is fit for. *See* "BUILDING LAND."
- "substantial brick," exaggerated description, 290.
- trustee may sell with new restrictions as to, 439.
- undisclosed covenant against, is an essential defect, 92.
- to erect, is an essential defect, 92.
- V.'s liability for dilapidations, 350.

"BUILDING LAND,"

- effect of describing adjoining land as, 8, 48.
- is a misdescription, if not fit for building, 25, 287, 290, 357, 364.

BUILDING MATERIALS,

- sale of, is within Statute of Frauds, 446.

BUILDING SCHEME, 46, 392, 427—429.**BUILDING SOCIETY,**

- reconveyance to, unstamped, 262.

BURDEN OF PROOF

- that abstract is imperfect, 267.
- misdescription was essential, 80, 90.
- material, 72, 75.
- P. taking possession accepts title, 274.
- P. was deceived by V.'s statement, 40, 67.
- influenced by V.'s statement, 72.
- V. has "no title at all," 274.

BURIAL GROUND, 216.**BUSINESS,**

- loss by P. through V.'s delay, 133, 336.
- V. in carrying on, not an "outgoing," 344.
- "premises," description neutralises notice of covenants restraining, 26.
- property bought for, time is essential, 303.

CARELESSNESS,

- V.'s, in stating his title is not "wilful default," 322.

CELLAR

- comprised in lease, but not occupied, 186.
- part of house bought, though not in P.'s occupation, 50.
- want of title to, 39, 282.

CERTIFICATE,

- expense of obtaining surveyor's, 411.
- in case of registered land, 404, 430.

CESTUI QUE TRUST,

- condition as to concurrence of, 223, 380.
- covenants for title by, 384.
- sp. perf. with compensation, injurious to, 105.
- V. unable to make good title without, P. may rescind, 313.

CHANCEL,

- liability to repair, should be disclosed, 39.

- CHARGE.** *See* INCUMBRANCE.
 of debts, executor selling under, 208.
 of paving expenses, &c., 344—347.
- CHATTELS,**
caveat emptor on sale of, 30.
 damages for loss of bargain on sale of, 130.
- CHEQUE,**
 action on, for deposit, defence to, 129.
 payment of deposit by, 172.
- CHILD,**
 appointment to, suspicion of fraud in, 200, 201.
 father buying from, suspicion of unfairness, 198.
- CHILD-BEARING,**
 contingency of, 115.
 presumption against (*qu.*), 196.
- CHOSE IN ACTION,**
 form of conveyance, 393.
- CHURCH,**
 statement that V. intends to build, 21.
 V.'s parol undertaking to build, 143.
- CHURCH OF ENGLAND,**
 proof that person was a member of, 195.
- CLAIMS,**
 adverse, make title doubtful, when, 189—191.
 usually need not be mentioned, 38.
 misleading statement as to, 12.
- CLEAR,**
 condition not sufficiently, 226—232.
 rent, 2.
- CLERK,**
 auctioneer's, authority of, to sign contract, 448. 449.
- CLIENT,**
 insufficient description of V., 451.
 purchase by solicitor from, 195, 198.
- COACH-HOUSE,**
 no access to, 185.
 no title to, 87.
- COAL,**
 misdescription of seam of, 71.
 omission to state workings abandoned, 34.
 receiver appointed to work, 353.
 V. working after contract to sell, 351.
- COLLATERAL**
 verbal agreement, damages recoverable for, 145. 146, 154.
- COLLIERY,**
 lessor having only moiety of, no sp. perf., 100.
 profits of, misstated, 108, 118.
- COMMENCEMENT OF TITLE,** 237—244.

COMMISSION,

auctioneer's, 173, 174.

COMMON,

right of, for sheep, described as "right of common," 84.
is an essential defect, 91.

COMMON MISTAKE, 56—59, 235, 272.

COMPANY,

doctrine of part performance applies to, 458.
expense of forming, not recoverable as damages, 135.
selling after issuing debentures as floating security, 199.
sufficient description of vendors, 452.
trustees of land, condition as to power of sale, 223.

COMPENSATION, 60, 78, 99—122, 152, 279—299.

after completion, 154, 277, 291.

time for requisitions, 292.

agreement to give, parol evidence of, admissible when, 144.

allowed against trustees, 105, 437.

amount affected by P. forcibly taking possession, 116.

assessment of, 107—122, 291.

claim for, not covered by condition as to requisitions (*qu.*), 269.

not defeated by condition that P. shall "admit," 222.

not waived by accepting conveyance on sale by Court, 277.

when covered by condition for rescission, 361—365.

condition allowing, to P., 285—294.

inconsistent with condition for rescission, 361—365.

may help Court to assess compensation, 111.

trustees may use, 437.

V. cannot avail himself of, after denying misdescription, 291.

condition allowing, to V., 284, 298.

condition refusing, to P., 294—297.

conduct of P. may aid Court in assessing, 108.

damages by way of, for loss of possession, 133, 334—336.

decreed when, 99—107.

defects admitting of, 109—111.

for appropriation made unnecessarily, none, 332.

defects in title, 281, 282.

known to the P., none, 100, 293, 294.

deficiency depending on duration of life, 113.

in duration of term of years, 111.

estate, 113.

quantity, 115, 116, 296.

description of under-lease as "lease" (*qu.*), 281.

deterioration by V., 351.

difference in tenure, 111, 281.

doubtful title (*qu.*), 109, 110.

dower, 114.

essential defects, none, unless P. wishes to complete, 78, 99, 285—291.

immaterial defect, none, 76.

improvements by P. in possession, 353.

V., 354.

incumbrances, 117.

leases for lives, where land subject to, 112.

life tenant's age misstated, 113, 291.

minerals, 118—120.

paving notice, 39, 76, 285.

profits, misstatement as to, 108.

quit rents, 91, 93.

COMPENSATION—*continued*.

- for repairs by P. in possession, 353.
- reservations to the Crown, 121.
- restrictive covenants, 122, 291.
- road not "made up," 122.
- sporting rights vested in stranger, 122.
- sum in gross called "freehold ground rent," 290.
- sum issuing out of whole land, or parts out of parts, 121.
- tenant, misstatement of name of, 120.
- timber, 120, 352.
- way, right of, over the land sold, 290, 364.
- yard, absence of title to, 290.
- inconsistent conditions as to, 297.
- indemnity as well as, 117, 124.
- inquiry as to, 108.
- P. may complete without requiring, 106.
- though bound to admit, may claim, under condition, 222.
- rescission instead of sp. perf. with, when, 78, 99, 285—291.
- set-off on claim for, 109.
- specific performance with,**
 - at P.'s desire, general rule stated, 99.
 - decree against third person purchasing from V. with notice, 100.
 - hardship, refused on ground of, when, 101—104, 292.
 - lease, on agreement for, 100.
 - trustees, on sale by, when granted, 104, 105, 437.
 - undertaking, on V.'s inability to perform, 101.
 - where condition for compensation, 285—294.
 - at V.'s desire, general rule stated, 99.
 - refused on ground of fraud, 60, 285.
 - where condition for compensation, 285—287.
- valuation of, 107—122, 179, 291.
- V.'s right to, in absence of stipulation, 279.
- waiver of objections not necessarily waiver of right to, 277.
- what errors &c. are covered by conditions as to, 280—285.

COMPLETION. *See* POSSESSION; INTEREST; CONVEYANCE; OUTGOINGS;
RENT; PROFITS.

- after, no relief, as a rule, 152.
- except for "common mistake," 56, 154.
- deterioration, 352.
- fraud, 60, 153.
- improvements, 353.
- under condition as to outgoings, 347.
- for compensation, 154, 291.
- covenants for title, 152.
- alteration of date of, on sale of land and hav, 338.
- effect of, on V.'s liability for deterioration, 350.
- conditions relating to, 300—354.
- distinguished in contract from "possession," 336.
- meaning of word, 152.
- in conditions of sale, 300.
- notice making time for, essential, 304—307.
- of work by local authority, 344—347.
- outgoings until and after, 343—347.
- rents and profits until and after, 337—342.
- time for, essential by express agreement, 302.
- if not, reasonable time allowed, 309, 310.
- negligence, effect of V.'s, on condition making, 310.
- not merely because essential for other matters, 302.
- on account of subject-matter, 301—304.

COMPLETION—*continued.*

- time for, essential, not if interest is agreed to be paid, 304.
- waiver of right to consider, 307—309.
- time for, extended under mistake as to V.'s title, 350.
- not fixed, reasonable time allowed, 301.
- what is, 152, 300.
- where V. has no title, P. may rescind before time fixed for, 311.

CONCEALMENT,

- criminal, of incumbrances, 65.
- fraudulent, of claims, 63.
- of fault in mine, 25.
- latent defects, 30—34.
- patent defects, 24, 30—35.

“CONCLUSIVE EVIDENCE.” 222, 258.

CONCURRENCE,

- condition as to, of other parties, 214, 223, 379, 380.
- of bankrupt, 379.
- cestui que trust*, 313, 379, 380.
- dower trustee, 379.
- incumbrancers, V. unwilling to get, 366, 367.
- mortgagor, on sale by mortgagee under power, 313, 314, 379.
- trustee in bankruptcy, 197, 380.

CONDITIONS OF SALE. *See* separate headings.

- construction of, 159.
- depreciatory, 433—441.
- effect of, in action for deposit, 158.
- sp. perf., 158.
- facts stated in, must be proved, 161, 233.
- general, 226.
- inconsistent, 297, 361.
- Incorporated Law Society's, reference to, 456.
- incorporation of, used on former sale, 301.
- inserted inadvertently, 161.
- misleading, 222, 232—234.
- not sufficiently clear, 226—232.
- office of, 156.
- particulars *versus* 156.
- P. has notice of facts stated in, when, 51.
- reasonable, 161.
- reference to, necessary in memorandum, 454.
- special, 228.
- statutory, force of, 161.
- stringent, described as “usual,” 162.
- unusual, 160.

CONDUCT

- of P. may enable Court to assess compensation, 108.
- show defect not essential, 80.
- waiver by. *See* WAIVER.

CONFIRMATION

- by principal, 314.

CONSIDERATION,

- V. may object to untrue statement of, 381.

CONSTRUCTION

- of Act of Parliament, 205, 206, 208, 209.
- conditions of sale, 159, 286, 295.
- contract, decided on V. and P. summons, 128.
- ill-drawn instrument, 205.
- particulars of sale, literal, impossible, 7.
- will, 209.

CONTINGENCY,

- admitting of actuarial computation, 113.
- of death without children, 114.

CONTINUING BREACH, 260.

CONVEYANCE,

- after, relief given, when, 56—59, 152—155, 277, 347, 352.
- agreement for "free," P. entitled to abstract, 263.
- by corporation under limited power, 243.
- concurrence of other parties in, 214, 223, 379, 380.
- condition as to, not precluding objections to title, 223.
- consideration, how stated in, 381.
- covenants in, 384—396.
- drafting, is not part performance, 458.
- easements, insertion in, 382, 384, 425.
- execution of, in P.'s presence, P. cannot require, 397.
- expense of preparation of, 135, 376, 411, 412.
- form of, P. may choose, 377.
- "to be settled by the Judge," 378.
- general words, 382.
- habendum*, 383, 384.
- indemnity, 390, 394.
- keeping mortgage on foot, 377.
- leaseholds, 393—395.
- on sale by trustee of creditors' deed, 395.
- parcels, 382.
- parties, 378.
- preparation of, 376.
- P. entitled to, of term, if conditions bind him to assume V. has it, 383.
- tendering draft, waives objections to title, 278.
- question as to, decided on V. and P. summons, 378.
- recitals, 381.
- restrictive covenants, 390, 391.
- not mentioned in contract, 383, 391.
- sale in lots, 392, 395, 429.
- separate, P. may have, for separate parcels, 377, 429.
- stipulations as to, by trustees, 438.
- time for delivery of draft, not essential, 396.
- to nominee of P., 378.
- V. causing delay by altering, 320, 322.
- may insist on P. taking, 376.
- need not execute, before suing for purchase money, 315.
- refusing to obtain mortgagee's concurrence in, 366.
- seeking to insert clause imposing new liability, 360.
- with benefit of restrictive covenants, 382.

CONVEYANCER,

- adverse opinions of, does not make title doubtful, 206.
- power to rescind if title not approved by, 374.
- title bad from point of view of, but good holding title, 234.

COPIES,

- attested, expense of, 414, 430.
 - on sale of lots with common title, 430.
 - P. entitled to what, 408.
 - sufficient evidence of lost deeds, when, 400.
- certified, of memorials, insufficient evidence, 400.
- compared with "completed drafts" insufficient, 400.
- of documents dated prior to commencement of title, 241.
- office, of instruments on record, 399.

COPYHOLD,

- admittance not a good root of title, without surrender, 238.
 - of heir of trustee-vendor, expense of, 412.
 - release from persons entitled to, 379.
 - V.'s neglect to procure, is "wilful default," 321.
- death of V. pending completion, 344.
- described as freehold, 73, 82, 281, 286.
- enfranchised, described as freehold, 82.
 - P. not to call for title to make enfranchisement, 241.
- enfranchisement, agreement by V. to procure, 214.
- freehold and, difference in value between, 73, 82, 111.

CORNER,

- length of frontage of plot with rounded, misrepresented, *Add.*

CORPORATION,

- title commencing with conveyance by, 243.

CORRECT

- description misleading, 6.

CORRECTION. *See* ALTERATION.COSTS. *And see* EXPENSES.

- jurisdiction of Court as to, not ousted by condition for rescission, 373.
- where action adjourned till adverse claim disposed of, 190.
- V. rescinds under sale by Court, 369, 443.

COUNSEL,

- conveyancing, adverse opinion of, does not make title doubtful, 206.
 - preparation of conditions by, 442, 443.
- deducing title "to satisfaction of," 213.
- "disapproving of title, agreement to be void," 364.
- trustees may employ, to draw conditions, 431.

COUNTY,

- misstatement as to, in which land lies, 88.

COURT, 442—445. *And see* SALE BY COURT.

- condition as to jurisdiction of, 229.
- leave of, required for trustees selling minerals separately, 433.
- payment into, to keep down incumbrances, 95, 102.

COURT ROLLS,

- acknowledgment for production on sale of freehold held of manor, 406.
- are instruments upon record, 399.

COVENANTS,

- affidavit by V. that, in lease have been performed, 195.
- breach of, condition as to waiver of, 222, 223, 257—260.
 - continuing, 260.
 - P.'s knowledge of, 147, 212.
 - V.'s knowledge of, 232, 259.

COVENANTS—*continued*.

- by P. on sale by trustee in bankruptcy, 394.
 - who took by assignment, 393, 394.
- to keep down interest on mortgage, 390.
- for production of title deeds, 405—408.
- for title, 384—389.
- notice of, not notice of breach, 50.
- on sale in lots, 390, 392, 426, 427—429.
- onerous, not mentioned, P. though accepting title may object, 225.
- performance of, affidavit by V. as to, 195.
 - receipt for rent evidence of, 257—260.
- restrictive, 390—393, 427—429.
 - breach of, at time of contract for sale, 50.
 - burden of proof of materiality of, 75.
 - compensation for, cannot be assessed, 122.
 - general condition covering, 158, 227.
 - in deed forming root of title, 244.
 - prior to commencement of title, 219.
 - insertion in conveyance to P., 383, 389, 390, 391.
 - mentioned in contract, but not in lease, 7.
 - misleading statement as to, 11, 12, 13.
 - misrepresentation as to, 20.
 - mistake by P. as to effect of, 53.
 - non-disclosure of, 39, 74, 75.
 - on sale of building estate, 47.
 - proof that prior owner had no notice of, 193.
 - P.'s knowledge of, 212, 213.
- “similar,” in granting a new lease, 396.
- to be inserted in the conveyance, 384—396.
 - in case of P.'s death, 392.
 - V.'s death, 387, 389.
 - on renewal of a renewable lease, 389.
 - sale in lots with restrictions, 392.
 - of equity of redemption, 390.
 - land in consideration of annuity, 393.
 - with building restrictions, 383, 389—391.
 - leaseholds, 389, 390.
 - registered land, 388, 389.
 - reversion, 390.
 - share in partnership, 390.
- to repair, 20, 28.
 - buildings removed, 32.
 - misrepresentation of law as to, 20.
 - objection that V. has broken, is not “objection to title,” 361.
 - P. not entitled to benefit of, in lease expiring on date for completion, 339.
- usual, in lease, what are, 20, 27—29, 395.
- “usual” on that estate, 20.

CREDITORS,

- conveyance for benefit of, 197.
- form of conveyance on sale by trustee of, deed, 395.
- who may take advantage of V.'s act of bankruptcy, 193.

CRIMINAL

- proceedings for concealment of incumbrances, 65.

CROPS,

- cut before completion, belong to V., 338.
- expense of realising, 341.

CROWN,

- grant from, is commencement of title to tithes, 241.
- V. need not produce office copy of, 399.
- no covenant for title on sale by, 384.
- reservation to, compensation not assessable for, 121.
- of minerals, title forced on the P., 196.

CULTIVATION.

- representation as to state of, 89.

CULVERT, 34. 92. 284. 285. 287, 295, 364.

CUSTODY

- of deeds. *See* TITLE DEEDS.

CUSTOM, 38.

- recital of, 255.

DAMAGE

- done by vagrants, V. liable for, 351.

DAMAGES, 130—138. *And see* EXPENSES.

- action for, instead of specific performance, 136, 137, 424.
- return of deposit in, 128.
- agent, person falsely representing himself as, liable in, 65.
- assessment of, 133, 134, 351.
- auctioneer liable in, 166, 167, 171.
- bidder liable in, for refusing to sign (*qu.*), 170.
- retracting bid (*qu.*), 171.
- condition as to, in case of P.'s default, 419.
- as to title, precluding recovery of, 215.
- expenses recoverable by P. as, what, 134—136.
- not if no valid contract within Statute of Frauds, 459.
- notwithstanding condition for compensation, 287.
- for breach of agreement to accept lease, 133.
- grant lease, 133.
- collateral verbal agreement, 145, 146.
- concealment of deeds and incumbrances, 65.
- deterioration, 351.
- falsification of pedigree, 65.
- fraud, pleadings must allege fraud, 138.
- loss of bargain, 130, 133.
- expected profits, 133, 336.
- misrepresentation as to agency, 132.
- non-delivery of abstract, 267.
- possession, 133, 334—336.
- parol misrepresentation, 10, 147.
- P.'s default, 419—424.
- V.'s delay in completion, 133, 334—336.
- refusal to complete, 131.
- procure lessor's licence, 131.
- inquiry as to amount, 138.
- lien for expenses, 138.
- "liquidated," 421—423.
- measure of, 133, 134.
- procedure for recovering, 136—138, 335.
- rule in *Bain v. Fothergill*, 130.
- trustees not bound to enforce condition as to, 438.
- V. in default cannot recover, 310.
- V.'s right to, in addition to forfeiture of deposit, 420.
- what recoverable by P., 130—138.
- by V. 419—424.
- where title not bad, but only doubtful, 187.

- DAMP,
 matter of fact, not of opinion, 16.
 untrue explanation of, 24.
- DANGEROUS STRUCTURE
 notice, work done under, is an "outgoing," 344.
 order of magistrate fixes liability for, 345.
- DANS LOCUM CONTRACTUI*, 67-77.
- DATE. *And see* TIME.
 of memorandum, material, 453.
- DAUGHTER,
 fraudulent appointment to, 200, 201.
- DEATH
 of annuitant on sale of annuity, 58.
 assured on sale of life policy, 58.
 intending lessee, 396.
 P. before completion, covenants in conveyance, 392.
 V. before completion, covenants in conveyance, 387, 389.
 expense of admittance of heir, 412.
 fine on sale of copyholds, 344.
 interest payable under condition, 319.
- DEBENTURES.
 company selling after issuing, as floating security, 199.
- DEBTS,
 executors selling under charge of, 208.
- DECEIT,
 action of, 62, 65, 77, 138.
- DECLARATION,
 statutory, conditions as to, 254, 262.
 V. must give better evidence if he has it, 254.
 that V. is entitled to forfeit the deposit, 424.
- DEEDS, 399-408. *And see* TITLE DEEDS.
- DEFAULT,
 both V. and P. in, at the same time, 310, 322.
 damages in case of P.'s, 419-424.
 defect in title discovered after P.'s, 419.
 in completing on the day fixed, 309-311, 417.
 delivering abstract, 263, 264, 268.
 interest in case of P.'s, 317.
 P. not in, refusing defective title, unless defect covered by condition,
 375, 418.
 P.'s, entitles V. to rescind, 417.
 re-sell, 419.
 V. in, deposit recoverable even if contract not signed, 459.
 V. not in, where delay caused by P., 325.
 V.'s in giving possession, 335.
 wilful, appropriation in case of V.'s, 320-322.
 damages in case of V.'s, 131, 335.
 interest in case of V.'s, 331.

DEFECTS,

- common to all land, need not be mentioned, 36.
- concealed by V., 30—39.
- essential, what, 78—94.
- in physical condition of property, 31—34.
- in prior title, disclosed by abstract or by V., 219.
- in title, 36—39, 281—283. *And see* TITLE.
- irremovable, 211, 212, 275.
- latent, maxim *caveat emptor* does not apply to, 30.
- what are, 31.
- not covered by general condition (*qu.*), 227.
- not disclosed by abstract, objection after conveyance, none, 152
- requisitions as to, 268, 277.
- omission to mention what, entitles P. to relief, 30—39.
- patent, partially visible defects are not, 34.
- positive misrepresentation as to, 24—26.
- V. need not mention, 31—34.
- what are, 31.
- P.'s knowledge, 67, 100, 147, 211, 213, 293, 294.
- serious, covered by condition for compensation (*qu.*), 280.
- trivial, covered by condition for compensation (*qu.*), 281.
- V.'s knowledge of, 227, 358.
- what, admit of compensation, 107—122.
- covered by condition for compensation, 280—285.

DEFICIENCY

- in acreage, essential, when, 85, 287.
- material, 73.
- not covered by condition as to identity, 252, 253.
- in length of term, 73, 85.
- in parcels, covered by condition as to identity, 252.
- in portion essential to enjoyment of residue, 86.
- magnitude of, a reason for not granting compensation (*qu.*), 101.
- on re-sale, how ascertained, 420.
- when covered by words "more or less," 3, 4, 252, 296.

DEHORS

- the contract, 10.

DELAY. *And see* DEFAULT; INTEREST; TIME; COMPLETION.

- damages for, 133, 335.
- protracted, may amount to repudiation, 417.

DELIVERY

- of abstract, 262—264.
- possession, 333—337.
- title deeds, 403.

DEPOSIT,

- auctioneer embezzling, V. liable to P., 173.
- not liable to *cestui que trust*, 433.
- stakeholder of, when, 172, 173.
- cheque for, defence to action on, 129.
- may be refused by V., 172.
- distinction between P.'s action for, and V.'s for sp. perf., 158, 215, 234, 288, 295.
- dividends on, in Court and invested, 127, 369.
- forfeiture of, 415—419.
- declaration of, in V.'s action for sp. perf., 424.
- injunction restraining P. from suing for, 288, 289.

DEPOSIT—*continued.*

- interest on, at 4 per cent., payable by V., 126.
 - auctioneer when liable for, 173.
 - not payable by P., 327.
 - set off against occupation rent, 127.
- I O U given for, 172, 419.
- lien for, 127.
- mortgagee fixing, at less than 10 per cent., not negligence, 441.
 - taking cheque for, not negligence, 441.
- not a penalty, 416.
- payment of, to auctioneer or solicitor, 172, 173, 433.
- P. leaving, in V.'s hands, does not waive essentiality of time, 308.
- receipt for, what sufficient to satisfy Statute of Frauds, 453.
- recovery of, 126—129.
 - action for, effect of, on condition for rescission, 372, 373.
 - not on ground that condition is misleading, 215, 232.
 - vague, 215, 226.
 - contract is not signed, 459.
 - V. has "no title at all," 215, 237.
 - not when title is merely doubtful, 187, 272.
 - except on sale by Court, 188.
 - precluded by condition as to compensation, when, 287, 295, &c.
 - identity, when, 252, 253.
 - requisitions, when not, 271, 272.
 - title, when, 215, 226.
 - procedure for, 128.
 - where essential misrepresentation or defect in title, 126, 288.
- retention of, is not waiver of right to treat time as essential, 309.
 - V. seeking fruitlessly to remove objections, 371.

DEPRECIATORY CONDITIONS, 433—440.

- adequacy of price, when relevant, 434.

examples of

- derivative leases, general condition as to, 435.
- easements, general condition as to, 436.
- recitals, condition making *all*, evidence, 436.
- title, condition fixing unnecessarily short, 434, 435.

examples of conditions which are not,

- compensation, condition allowing, to P., 437.
- identity, usual condition as to, 437.
- recitals, fifteen years old, made evidence, 436.
- rescission by V., condition allowing, 438.
- statutory conditions, 433.
- title, ten years', given on sale in small lots, 435.
- trustees' receipt made sufficient discharge, 438.
- joint sale, conditions required for one property only, 440.
- life tenant under Settled Land Act, 1882, . . . 431.
- mortgagee may not use, unnecessarily, 440.
- P. cannot object on ground of, 434.
- railway company selling surplus land may use, 431.
- remedy of *cestui que trust*, 434.
 - mortgagor, 440, 441.
- tests of, 434.
- trustee may not use, unnecessarily, 433.

DEPTH

- misdescribed, 4, 24.

DESCRIPTION. *And see* MISDESCRIPTION.

- correct, but misleading, 6.
- misleading because incomplete, 4, 5.
- vague, 59.
- what, sufficient within Statute of Frauds, 451-453.

DESTRUCTION. *And see* DETERIORATION.

- of property before date of contract, 58.

DETAILED

- statements, 4, 12.

DETERIORATION, 347—353.

- accidental, is borne by P., 347.
- damages for, how assessed, 351.
- irremediable, entitles P. to rescind, 352.
- makes V. liable to account as for wilful default, 341.
- permissive, by V., 350.
- set off against interest payable by P., 329.
- V. may escape liability by notifying P., 351.
 - offering possession, when, 350
- wilful, by P., 352.
 - by V., 347.

DEVISE

- made root of title, 238.
- of "undivided moiety," inference that testator had only moiety 200

DILAPIDATIONS. *And see* DETERIORATION.

- benefit of covenant to repair, 339.

DIMENSIONS. *And see* ACREAGE.

- depth misstated, 4.
- frontages of rounded corner lot misdescribed, *Add.*

DISCLOSURE. *See* NON-DISCLOSURE.

DISCOVERY.

- aliunde*, 216—223, 242, 244, 256.
- P.'s right to, in V.'s action for sp. perf., 217, 402.

DISENTAILING

- assurance, execution of, enforced, 96.
- not good root of title, 237.

DISPUTE,

- agreement to accept title without, 220.
- as to bidding, 165, 170.
- to be submitted to conveyancer, 374.

DISTANCE,

- misrepresentation as to, 88, 290.

DOCUMENTS. *And see* TITLE DEEDS.

- notice of, 246—250.
- opportunity of inspection of, 249.
- reference to, 231.
- two, connected together, 452, 455.

DOUBTFUL

- right, contract to sell, 59.

DOUBTFUL TITLE, 186—211.

- deposit cannot be recovered on ground of (*qu.*), 187, 188.
- paid out on sale by Court because of, 188.
- expenses not recoverable on ground of (*qu.*), 187.

facts doubtful, 192—202.

- bona fides*, 197.
- forfeiture not presumed, 199.
- incapable of proof, 192, 193.
- negative, proof of, 193.
- notice, 193.
- oral evidence, 194.
- presumptions, 195—201.
- suspicion, 196—202.
- what facts must be proved, 192.

law doubtful, 202—211.

- point covered by decision*, 202—206.
 - prior decision adverse, 202.
 - favourable, 205.
 - of inferior Court, 204.
 - prior decisions conflicting, 205.
- point not covered by decision*, 206—211.
 - adverse *dicta*, 206.
 - opinion of counsel, 206.
 - point of construction, 209.
 - general law, 207.
- lis pendens* does not make title doubtful, 189.
- mere claim does not make title doubtful, 191.
- probability of adverse rights being exercised, 191.
 - litigation, 189.
- P. cannot be compelled to accept, 186.
 - claiming compensation, 109, 110.
 - sending in requisitions too late, must accept (*qu.*), 272.
- V. and P. summons, 187.

DOWER,

- compensation for, 114.
- indemnity against, 123.

DRAFT

- agreement, solicitor's signature of, 449.
- completed, copy of deed compared with, not sufficient evidence of lost deed, 400.

DRAIN. And see CULVERT.

- marked on plan, 46.

DRAINAGE

- expenses reimbursed under local Act, 339.
- misstatement as to, 10.
- notice, 344—347.
- rates, misstatement as to, 284.
- taxes under public Act, non-disclosure of, 37.
- warranty as to, 146, 154.

DRY-ROT, 25, 75, 89.**DUTY,**

- conflicting, of vendor, 96, 97, 105.
- of mortgagee selling, 440.
- trustee selling, 105, 431.
- succession. See SUCCESSION DUTY.

W.

DWELLING-HOUSE

converted by P. into shop, 352.

EASEMENTS,

condition as to, effect of general, 227, 436.
 insertion of reference to, in conveyance, 360, 382, 384, 425.
 intention to reserve, 8.
 known to V. not covered by general condition (*qu.*), 227.
 misleading statement as to, 12.
 necessary to enjoyment of property, absence of, 33, 269.
 on sale in lots, 425.
 over "building land," 25, 287, 290.
 title to, on contract to grant lease, 241.
 undisclosed, are essential defects, when, 92, 286, 296.
 V. entitled to retain deed extinguishing, 403.
 what, are patent defects, 31, 32, 33.

EAU BRINK TAX,

misstatement of, 109.

ECCLESIASTICAL LEASE,

habit of renewal, 112.
 misdescription of renewable sub-lease, 5.

EJECTMENT,

judgment in, should be abstracted, 265.

ELECTION,

by P. for partial performance with compensation, 99.
 giving defendant, in case of parol variation, 145.

ENDORSEMENT. *See* INDORSEMENT.ENFRANCHISEMENT. *See* COPYHOLDS.

ENJOYMENT

of land, reservations inconsistent with. *See* RESERVATION.
 P.'s, of part with good title, liable to be affected by adverse possession
 of other part, 88.

ENLARGEMENT DEED.

effect of, condition as to, 229.

ENTRY,

power of, V. entitled to insert in conveyances when, 392.

ENVELOPE

and enclosure connected, 450.

EQUITY OF REDEMPTION,

covenant by P. on sale of, 390.
 interest on mortgage misstated, 3.
 set off against interest on purchase money, 328.
 mortgage must be mentioned in particulars, 38, 157, 227, 230.
 sale of, loan to be continued to P., 311.

ERROR. *And see* MISTAKE and COMPENSATION.

clerical, in abstract, 267.
 "shall not annul the sale," 280.
 V. compelled to make good, 95.

ESSENCE.

time of, 301—309. *And see* TIME.

- ESSENTIAL, 78—94, 286, 287.
 adjuncts, what are, 181, 182.
 burden of proof that defect is, 80, 90.
 deterioration, 352.
 inquiry directed whether defect is, 81.
 matters must be reduced to writing, 450—454.
 misdescription, 78—94. *And see* MISDESCRIPTION.
 part of property, no title to, 86.
 time when, 301—309. *And see* TIME.
- ESTATE *PUR AUTRE VIE*,
 sp. perf. when V. has only, 100.
- ESTIMATION,
 acreage given by, 4.
 annual value by, 4.
- ESTOPPEL
 by representation, 21, 23.
- EVICITION,
 possession only possible by, of tenant, 336.
 P. exposed to, no sp. perf., 235.
- EVIDENCE. *And see* PRESUMPTION.
 burden of proof of essentiality of misdescription, 80.
 materiality of misdescription, 72.
 restrictive covenant, 75.
 that P. was deceived, 67.
 where statement ambiguous only, 40
 “conclusive,” 222, 258.
 negative, covenant for production of deeds which are merely, 405.
 of facts in title, 193.
 of facts stated in conditions, 161, 233.
 identity, 250—254.
 payment of fee-farm rent, condition as to, 237.
 title. *See* TITLE.
 V.’s heirship, condition as to, 234.
 parol, admissible to prove fraud, 139.
 misrepresentation, 147.
 P.’s knowledge, 140—147.
 inadmissible to vary written contract, 139, 213.
 of auctioneer’s statements, 140, 141.
 collateral agreement, 145.
 title depending on, is doubtful (*qu.*), 194.
 P. entitled to better, if V. has it, 223, 254.
 secondary, of lost deeds, 400.
- EXAMINATION
 of title deeds, expense of, 135.
- EXCESS,
 compensation for, when allowed to V., 55, 279, 298.
- EXCHANGE,
 bill of, in payment of deposit, 172.
- EXECUTION
 of conveyance in P.’s presence, P. cannot require, 397.
 of lease commencing title, must be proved, 240.

EXECUTOR,

- assent of, condition as to, 229.
- is sufficient description for Statute of Frauds, 451.
- may require indemnity, on sale of leaseholds (*qu.*), 394.
- must give indemnity on sale of leaseholds in lots, 390.
- power to sell within twenty years, 208.
- presumption that he sold as executor, 197.
- selling leaseholds in lots, form of conveyance, 390.
- statement that V. is, effect of on P.'s rights as to conveyance, 390.

EXPENDITURE

- by P. on the property, 66, 155, 353.
- is part performance, 457.

EXPENSES, 134—136, 409—414.

- agreement to pay, is not agreement to pay interest, 317.
- condition as to, of conveyance, 412, 413.
 - relieving V. of, only, 257.
- incurred but not actually paid by P., 136.
- of abstract, 410.
 - agreement, 135.
 - apportionment of tithes, 410.
 - certificate required to complete title, 411.
 - conveyance, 411, 412.
 - covenant for production, 414.
 - evidence not in V.'s possession, 409.
 - examination of title deeds, 135.
 - getting in outstanding estates, 412, 413.
 - investigating title, where V. has no title at all, 359.
 - more than one abstract to same P., 429.
 - paving, borne by whom, 344—347.
 - procuring concurrence of necessary parties, 412, 413.
 - information material to title, 411.
 - production of title deeds, 404, 409.
 - registration, 410, 412, 413.
 - search in Irish registry, 411.
 - stamping, 261, 410.
- P.'s lien for, 138.
- under sale by Court, on V.'s rescinding under power, 131, 369, 443.
- V. rescinding on ground of, 367.
- what recoverable as damages by P., 134—136.
- where sale not binding within Statute of Frauds, 459.

EXPERT, 15.

EXPIRED

- lease, not a muniment of title, 400.

EXTINGUISHMENT

- of easement, deed proving, may be retained by V., 403.

FACTS,

- doubtful, 192—202.
- presumed, 195—198.
- P. agreeing to "admit," 221.
- stated in conditions, P. may require proof of, 200.
- untruly stated in conditions, no spec. perf., 233.
- which P. can require proof of, 192.
- which V. need not state, 35—39.

‘ FAIR VALUE,’ 179.

FAIL

- of buildings before completion, 347.
- timber, belongs to P., 338.

FARM,

- alteration of date of completion on sale of, 338.
- tenant's valuation paid by V. and deducted, 341.
- unusual agreement as to valuation, 38, 50.
- V.'s unhusbandlike farming, 350.

FATHER,

- appointment by, to child, suspicion of fraud in, 200.
- purchase by, from child, suspicion of unfairness of, 198.

FEE-FARM RENT,

- compensation for, 117.
- sale of, condition as to non-payment, 237.

FENCE,

- covenant by P. to erect and maintain, 391.
- hidden by shrubbery, 44.
- inference as to ownership of, 3.
- liability to keep up, is an essential defect, 92.

FIDUCIARY RELATION. *See* TRUSTEE.**FINES,**

- belong to V., 338.
- misrepresentation as to, 18, 74, 118, 284.
- payable on death of V. of copyholds, 344.
- V. pays, necessary to enable him to surrender, 412.

FIRE,

- insurance against, 348—350.
- loss by, falls on P., 347.

" FIRST EDITION "

- of particulars, 53.

FIXTURES,

- conveyance of leaseholds and, 381.
- mortgagee may not sell, separately, 441.
- payment for, separately, 177.
- P.'s notice of tenant's, 176.
- tenant's, on sale of public house, 182.
- valuation of, 179.
- V. may not remove, 176, 177.
- what are, 177.

FLOATING SECURITY,

- company selling after issuing debentures as, 199.

FLOOD, 58.**FOOTWAY,** 44. *And see* ROAD.**FORCIBLE**

- possession taken by P., effect of, 80, 275.

FORECLOSURE,

- mortgagee selling after, 199, 377.

FORFEITURE,

- leaseholds liable to, for non-insurance, 344, 350.
- liability to, essential defect, 83.
 - on sale of under-leases, 36.
- of deposit, 415—419.
 - though no loss on re-sale, 421.
 - when time not essential, 417.
- possibility of, where V. sells "his interest if any," 236.
- presumption against, 399.
- P.'s knowledge that property is liable to, 212.
- V. not compelled to incur risk of, 98.

FORGERY,

- condition untruly stating that deed was, 233.

FRAUD, 60—66.

- by agent, 64, 65.
- compensation for, after completion, 154.
- damages for loss of bargain, 80, 130, 133.
- definition of, 61.
- effect of, on condition for compensation, 287, 290, 295.
 - rescission, 356.
 - sending in requisitions, 272.
 - refusing compensation, 294.
- rights of parties, 60.
- in concealing claims, 63.
 - delivering imperfect abstract, 356.
 - describing copyhold as "freehold," 61.
 - misstatement of law, 63.
 - title, 61.
 - offering defective title (*qu.*), 63.
 - referring P. to ignorant agent, 64.
 - selling abandoned mine, 34.
- innocent statement fraudulent *ex post facto*, 61.
- "legal fraud," 61.
- non-disclosure amounts to, when, 63.
- on power, contract which would be, not enforced, 105.
 - suspicion of, 200, 201.
- parol evidence admissible to prove, 139.
- pleadings must allege, 138.
- P.'s opportunity of discovering the truth is immaterial, 70.
- rescission after completion, for, 153.

FRAUDULENT

- misdescription, not covered by condition for rescission, 356.
- use of condition for rescission, 356.

"FREE CONVEYANCE,"

- effect of condition for, on P.'s right to an abstract, 263.
- expense of registration in Land Registry, 413.

FREEHOLD,

- copyhold described as, 82.
- described as copyhold, 73, 82.
- enlarged leasehold, condition as to, 229.
- held of manor, production of court rolls, 406.
- mixed with copyhold (or leasehold), 251, 253.
- "nearly equal to," 18.

FRONTAGE,

- condition allowing compensation to V. not enforced, 299.
- misdescription as to extent of, is essential, 87, 287.

FRONTAGE—*continued.*

of corner plot with rounded corner misdescribed, *Add.*
want of title to, is an essential defect, 87, 90.

FURNISHED HOUSE, 9.

FURNITURE

is a non-essential adjunct, 181.

FURTHER REQUISITIONS, 269.

GAME,

undertaking to kill down, 146.

GASWORKS, 74, 92.

GATEWAY, 44.

GAVELKIND,

half purchase money on previous sale paid to dowress, 199.

GENERAL CONDITIONS, 226.

GENERAL DEVISE

made root of title, 238.

GENERAL WORDS,

V. entitled to insert words limiting, when, 382.

GRASS. *See* CROPS.

GROUND RENT

"amply secured," 26.

annual sum in gross described as, 290.

improved rent described as, 74, 290.

more than stated, is a subject for compensation, 91.

no powers of distress and entry, 185.

notice of amount of, by reference to lease, 12.

omission to mention, 12, 38.

rack rent described as, 74, 290.

rent for user of garden, described as, 2, 26, 84, 156.

what is, 2.

GUARANTEE. *And see* WARRANTY.

as to possession, 335.

by directors, as to annual profits, 18.

V. as to profits, 9.

contract to give, must be in writing, 170.

deposit is a, 415.

HABENDUM, 383, 384.

HARDSHIP,

compensation under condition, notwithstanding, 104, 292.

ground for refusing sp. perf., 53, 55, 97, 101—104.

HAY,

alteration of date of completion on sale of land and, 338.

HIGHEST BIDDER, 169. *And see* BIDDER.

HOUSE,

- "brick-built," 16, 89.
- furnished, 9.
- knowledge by tenant of dimensions of, not presumed, 24, 69.
- lease of moiety of, 100, 116.
- misrepresentation of repairs non-essential, when, 89.
- "my," P. knowing that V. has a lease only, 6.
- "not damp," 16, 24.
- number of, in street, misstated, 283.
- P. converting dwelling, into shop, 352.
- sale of, for residence, time essential, 304.
- "substantial," 16, 24, 290.

HUSBAND AND WIFE.

- selling wife's land, 100.

IDENTITY, 250—254.

- condition as to, 251, 437.
 - deficiency in acreage is not covered by, 252, 253.
 - parcels is covered by, 252.
- impossibility of identifying land sold, 253.
- insufficient to enable V. to enforce completion, 251.
- misleading, 234, 251.
- stringent, used by trustees, 437.
- sufficient to preclude P. from recovering deposit, 251.
- evidence of, V. having better, must give it, 254.
 - in absence of condition, 250.
 - where copyholds and freeholds mixed, 251.
 - leaseholds and freeholds mixed, 251.
- of persons presumed from identity of names, 196.
- property, misdescription affecting, is essential, 81.
- waiver of requisition as to, 253, 273.

IGNORANCE. *And see* KNOWLEDGE.

- P.'s, of law, 19, 58.

IMMATERIAL

- defects and misdescriptions, 72—77, 92.

IMPLIED

- agreement to give good title, 184.
- statement that land is freehold, 185.

IMPROVEMENTS

- by lessee before buying, 135.
- P. rescinding after completion, 155.
- taking possession, compensation for, 66, 353.

INCLOSURE AWARD, 238, 244.

INCOME TAX,

- deduction of, from interest payable on purchase money, 333.

INCONSISTENT

- conditions, 297.
- statements as to profits, 70.
- verbal agreement, 146.

INCORPORATED LAW SOCIETY'S

- conditions, incorporated in contract, 456.

INCORPORATION

- of conditions used on former sale, 301, 324.

INCUMBRANCE. *And see* MORTGAGE.

- appearing in deed forming root of title, 244.
- compensation for, 117.
- concealment of, by shortening title, solicitor liable (*qu.*), 66.
 - is a misdemeanour, 65.
- discharge of, under Conv. Act, 1881, s. 5 . . . 95, 102.
- exceeding the purchase money, 95.
- indemnity against, 125.
- irremovable, ground for rescission, 91.
- mention of, in conditions, insufficient, 38, 49, 157.
- notice of, to V.'s predecessor in title, 193.
- paid off out of purchase money in Court, 153.
 - notwithstanding conveyance executed, 152, 153.
- preparation of deed getting in, 376.
- P. may insist on having, got in by separate deed (*qu.*), 378.
- V.'s refusal to obtain release of, is unreasonable, 366, 367.
- what, an essential defect, 90—92.

INCUMBRANCER,

- concurrence of, 366, 367.

INDEMNITY, 123—125.

- against annual payment, on sale in lots, 426.
 - dower, 123.
 - mortgage on sale of equity of redemption, 390.
 - rent on sale of leaseholds. 393—395.
- form of, in the conveyance, 390, 391.
- in addition to compensation, 117, 124.
- in lieu of compensation, 123.
- purchase money set apart as, for one purpose, applied for another, 153.
- P. cannot be compelled to take, 125.
- P. must covenant to give V., when, 390.
- V. can be compelled to give (*qu.*), 124.

INDEPENDENT

- agreements to buy two properties, 143, 144.

INDORSEMENT

- on licence, one, does not prejudice P., 398.

INFERENCE. *See* PRESUMPTION.INFORMATION. *And see* NON-DISCLOSURE.

- V.'s duty to give P., as to his title, 226.

INITIALS,

- signature by, not sufficient, 447.

INJUNCTION,

- restraining mortgagee from selling, 441.
- obstruction to valuation, 181.
- P. from cutting timber, 353.
- suing for deposit, 288.

INNOCENT

- misrepresentation covered by condition for rescission, 356—359.

INQUIRY

- as to damages, 138.
 - essentiality of defect, 81.
- to ascertain amount of compensation, 108.
- settle indemnity, 123.

INSPECTION

- of documents, opportunity of, must be given to P., 249.
- lease gives P. notice of special covenants, 426.
- property by P., 70, 72.
 - offer of, 70, 295.
- sale plan by P., 43.
- title deeds, 263, 402.

INSTALMENTS,

- agreement as to interest on, 328.
- forfeiture of, previously paid, treated as penalty, 316.
- long delay in payment of, not repudiation of contract, 315.
- payable on sale of minerals. form of conveyance, 393.
- payment of purchase money in, 309, 315, 316.
- P. not entitled to possession until he pays last, 334.

INSURANCE,

- fire, company can claim repayment from V., 348.
- condition giving P. benefit of V.'s, 349.
- premiums treated as outgoings, when, 344, 350.
- P. can compel company to rebuild, when, 348.
- P. cannot recover from V., 348.
- life, rate of, how far notice of state of health, 69.
- sale of policy after death of assured, V. relieved, 58.

INTENTION,

- misrepresentation of, 20—23.
- of P. communicated to V., 13.
- statement of, construed as undertaking, 20.
- tenant's, to leave (no notice to quit), V. need not mention, 35.
- V. may alter, notwithstanding representation, 22.

INTEREST,

- agreement for payment of, shows time is not essential, 304.
- misstatement as to rate of, on sale subject to mortgage, 2.

(1) payable by purchaser,

- agreement to pay "expenses" does not bind P. to pay, 317.
- appropriation of purchase money, 329—333.
 - investment producing *more* interest, 332.
- condition for payment of, 317—324.
 - "*in case of P.'s default*," 317.
 - P.'s default succeeded by V.'s default, 318.
 - "*from any cause whatever*," 318—320.
 - non-delivery of abstract, 319.
 - P. cannot escape by appropriation except in case of V.'s wilful default, 331.
 - "*from any cause except V.'s wilful default*," 320—322.
 - other forms of the condition, 323.
- declaration as to, on V. and P. summons, 324.
- erroneously paid cannot be recovered on summons, 324.
- exceeding rents and profits, 317.
- in absence of condition P. must pay, if in default, 316.
- in case of compulsory purchase by railway company, 326.
- income tax on, 333.
- not payable if V. is in default, 317.
 - if V. is to have rents in case of delay, 316.
- on deposit, not payable, 327.
 - instalments of purchase money, 328.
 - price of timber, 327.
 - sum retained by P. to pay off incumbrance, 328.
- order to pay, on sale by Court, 317.

INTEREST—*continued*.

- P. cannot avoid, by paying purchase money into Court, 330.
- though entitled to rescind must pay, if he completes, 317.
- rate of, 328.
- set-off of rent and damages for deterioration, 329, 444.
- on purchase by mortgagee of equity of redemption, 328.
- subsequent agreement as to, 329.
- though P. receives no rent, 326.
- time from which payable**, 324—327.
- condition making, payable from execution of conveyance, 327.
- from "making" or "showing" a good title, 325.
- on sale of reversion, 326.
- where abstract not delivered in time, 324.
- perfect, 324.
- no time fixed for completion, 325.
- P. takes or is in possession, 326.
- takes untenable objection, 325.

(2) **payable by vendor**,

- on deposit, 126.
- not if contract not binding within Statute of Frauds, 459.
- money borrowed by P. to complete, 134.
- outgoings and costs where contract set aside after conveyance, 155.
- purchase money, 134.
- sale of "V.'s," in the property, 220, 221, 236, 257.
- set-off against occupation rent, payable by P., 127.

INTERMIXED,

- freehold and copyhold, 251, 253, 254, 273.

INTERPLEADER

- by auctioneer as to deposit, 174.

INTESTACY,

- condition binding P. to assume, 228.

INVESTIGATION

- by P., effect of, 69—72.
- of title, expenses of, recoverable by P., 135.
- precluded by conditions, 214—237.
- offer of facilities for, 70, 71.

INVESTMENT

- of deposit paid into Court, 126, 127, 369.
- purchase money, 329—333. *And see* APPROPRIATION.
- in joint names, 333.

I O U,

- given for deposit, 172, 419.

IRELAND,

- V. bears expense of search in Registry in, 411.

IRREMOVABLE DEFECT, 211, 212, 275.

JETTY,

- no title to, 87.

JOINT SALE,

- apportionment of purchase money on, 381, 432.
- depreciatory conditions on, 440.
- one V. unable to complete, *sp. perf.* against other V., 100.
- trustees may make, when, 431.

JOURNEYS,

- for investigating title, expense of, recoverable as damages, 135.
- P. bears expense of, 409.

JUDGMENT,

- effect of, on V.'s right to rescind under condition, 373.
- in ejectment, should be abstracted, 265.
- notice of, doubt whether V. had, 193.
- P. entitled to separate conveyance of, 378.
- searches for, expense of, recoverable as damages, 135.

JURISDICTION,

- condition as to, 229.
- on V. and P. summons. *See* SUMMONS.

KITCHEN,

- right of user by third persons, 92, 296.

KNOWLEDGE,

- lessor's, that he has no title at all, 63.
- P.'s, bars rescission, when, 67, 68, 147, 211.
 - does not cure imperfection in memorandum, 456.
 - effect of, negatived by express agreement to give good title, 212.
 - of breach of covenant, 212, 259.
 - defects in title, no compensation, 100, 293, 294.
 - waiver of requisitions, 274—277.
 - facts may be inferred, 68, 69, 70, 71, 141, 142.
 - restrictions affecting the land, 213, 391.
 - the property, inference as to latent defects, 33.
 - V.'s intention in selling, 303.
 - professional, effect of, 34, 70, 71.
 - P. relying on his own, 54, 69, 70.
 - P.'s resort to other means of, 70.
 - that the land is copyhold, 185.
 - leasehold, 212.
 - V.'s, effect of, in case of breach of covenant, 232, 259.
 - on condition for rescission, 358.
 - precluding requisitions, 226—228, 261.
 - that P shall "assume," 222, 232.
 - is "wilful default" within condition for interest, 321.
 - of agent's misrepresentation, 64.
 - of P.'s intention in buying, 295, 304, 353.
 - of P.'s mistake, 54.
 - that his misrepresentation has been communicated to P., 55.
 - that part of the land may be copyhold, 61, 62.
 - that P. has bought for building, 295.
 - wishes to pull down and rebuild, 353.
 - when material in case of non-disclosure, 30, 31.

LACHES. *See* DEFAULT.

LAKE,

- land described as bordering on, 296.

- LAND,
 no access to, 185.
 sale of, *simpliciter*, implies fee-simple, 185.
- LAND CERTIFICATE, 404, 430.
- LAND REGISTRY. *See* REGISTERED LAND.
- LAND TAX,
 effect of recital of sale free from, 255.
 misdescribed, 121.
- LANDLORD,
 consent of, to assignment, 131, 189, 217, 262, 312, 398.
- LATENT DEFECTS, 30, 31—34.
- LAW,
 misrepresentation of, 19, 20.
 fraudulent, 63.
 mistake of, no ground for relief, 58.
- LEASE,
 building, sale of, time essential, 304.
 cellar comprised in, 185.
 contract by fluctuating body to grant, time essential, 303.
 for, P. of leaseholds cannot call for, 243.
 to assign, not satisfied by grant of new lease, 186.
 grant, involving fraud on power, 105.
 measure of damages for breach of, 133.
 covenants in, proof of performance of, 195, 257.
 what are usual, 27—29, 48, 395.
 deficiency in length of term, compensation for, 111.
 derivative, 41, 83, 247, 282, 435.
 P.'s position not affected by Conv. Act, 1881, s. 14 . . . 83.
 determinable, misdescription of, 73.
 determined by re-entry, should be abstracted, 265.
 duration of, misdescription as to, compensation for, 111.
 ecclesiastical, 5, 112.
 equitable, 83.
 execution of, must be proved (*qu.*), 240.
 expired, is not a muniment of title, 400.
 for lives, compensation for undisclosed, 112.
 misleading statement as to, 11.
 forfeiture of. *See* FORFEITURE.
 inspection of, gives P. notice of covenants, 426.
 opportunity must be given for, 249, 250.
 length of term misstated, 43, 73, 85, 111, 293.
 lessee's name misstated, 74.
 lessor's title, P.'s right to call for, 217—219, 238—240.
 misleading statement as to, 5, 12.
 notice of contents, P. has, when, 246, 426.
 facts invalidating, 193.
 of copyholds, condition as to lessor's title, 240.
 lessee's own property, 58.
 omission to mention, 39.
 option to determine, not mentioned, 39.
 parol agreement to exclude parcels, 140.
 power, lessee's knowledge that, is in excess of, 212.
 receipt for rent proving performance of covenants, 257.
 reference to, 7, 12, 185, 247.
 registration of assignment with lessor, 311.

LEASE—*continued*.

- reversionary, unknown to both V. and P., 57.
- surrender of, agreement to procure, 214.
- surrendered, on grant of new lease not a muniment of title, 400.
- under S. L. A., conflicting evidence as to *bona fides*, 201.
 - notice of facts invalidating, 193.
- under-lease described as, 41, 51, 68, 73, 83, 281.
- validity of, condition as to, 225, 230.
- V. must convey full term, if conditions bind P. to assume V. has it, 383.
- voidable, not so described, 39, 83, 186.
- waiver of breach of covenants in, 258—260.

LEASEHOLD,

- assent of executors, condition as to, 229.
- covenants by P. on sale of, 393.
 - V. on sale of, in lots, 390.
- described as freehold, 82.
- enlarged, doubt as to enlargement, 157, 229.
- liability of, to forfeiture, 36, 98, 212, 247, 344, 350.
- licence to assign, 97, 189, 312, 398. *And see* LICENCE.
- mixed with freehold, 251, 253.
- P. knowing property to be, 212.
- renewable, misdescription of, 112, 121, 282, 286, 291, 364.
 - misrepresentation as to fine, 18.
- rent not apportionable on completion (*qu.*), 343.
 - of, sold in lots, apportionable, 426.
- sold in lots, 426.
 - by executors, 390.
 - the Court, 444.
 - trustees, by sub-demise, 439.
 - covenants in conveyance, 390.
- what title P. may claim, 186, 238.

LEAVING

- England, delay caused by V., 321.

LEGACY,

- charged on land, purchase money paid into Court, 96.

LEGAL ESTATE,

- condition as to, 257.
- in absence of condition, 256.
- outstanding, not a case of "no title at all," 270.
- P. may insist on having, got in by separate deed (*qu.*), 378.
- requisition as to, is not an "objection to title," 269, 361.
- V.'s unwillingness to get in, 366.

LENGTH

- of frontage, 87, 287, *Add.*
 - notice fixing completion, 305—307.
 - term, 85, 111.
 - title, 230, 237—244.
 - wharf, 287.

LESSEE

- purchasing reversion, notice as to cellar, 50.
- with option of purchase, improvements by, 135.

LESSOR'S TITLE, 141, 217—219, 238—240, 444.

LETTER

- and envelope connected, 450, 455.

LETTING,

V. liable for, 340.

LICENCE,

lessor's, to assign

damages for V.'s refusal to procure, 131.

sale subject to, 262, 398.

specific performance if, refused (*qu.*), 97, 189, 312, 398.

V. not bound to sue lessor for, 262, 398.

V.'s delay in procuring, 311, 312.

public house,

condition as to transfer of, 397.

indorsement on, 398.

interim protection, magistrate's refusal, 397.

P.'s risk as to, 348.

transfer of, 397.

LIEN.

auctioneer's, on deposit for commission, 174.

P.'s, for deposit, 127.

expenses, 138.

LIFE,

actuarial computation of, 110.

annuity. *See* ANNUITY.

estate described as fee, 84, 113, 282.

notice that life is unhealthy, 51.

omission to mention dispunishable for waste, trustee selling, 439.

policy, death of assured before contract to sell, 58.

tenant. *See* TENANT FOR LIFE.

LIGHT, 8, 34. *And see* EASEMENTS.

LIQUIDATED DAMAGES, 421—423.

LIS PENDENS.

does not of itself make title doubtful, 189.

LITIGATION,

effect of, on V.'s rights under condition for rescission, 372.

probability of, makes title doubtful, 189.

V. not compelled to enter into, 191.

LOCAL ACT, 37. *And see* ACT OF PARLIAMENT.

LOCAL AUTHORITY,

notice by, 344.

LONDON,

fire insurance, 348, 349.

registered titles. *See* REGISTERED LAND.

sanitary notices, 345, 346.

LOSS

in carrying on business is not an outgoing, 344.

of bargain, damages for, 130, 133.

deed which should have formed root of title, 435.

title deeds, 400, 401.

on re-sale of live stock bought by P. to stock land, 134.

through not being able to carry on business on property, 133.

selling out stock, not recoverable as damages, 135.

LOTS, 425—430.

- abstracts on sale in, 429.
- apportionment of tithe rent-charge, 426.
- attested copies of common title deeds, 430.
- easements between different, 425.
- general building scheme, 427—429.
- indemnity against annual payments, 426.
- land certificate, who entitled to, 430.
- leaseholds sold in, 426.
 - conveyance by demise, covenants by P., 395.
 - by V., 390.
- on sale by Court, 444.
- rent, indemnity against, 395.
- special covenants, indemnity against, 426.
- trustees may convey by sub-demise, 439.
- part performance in respect of one lot, 458.
- party-wall, 427.
- P. buying two, may require good title to both, when, 87, 186, 425.
 - two conveyances, 429.
- P. mistaking which lot is being sold, 53.
- reservation of small piece not subjected to restrictions, 47.
- restrictions enforceable by all purchasers, when, 427.
- restrictive covenants on sale in, 392, 427.
- roads, P. of one lot not entitled to have *all*, made, 45.
- timber, declaration as to, on one lot, 176, 425.
- title deeds to P. of largest lot, 429, 430.
- unsold. condition that P. of largest lot shall have deeds, 429.
 - restrictions shall not affect, 427.
- V. covenants in respect of, 393.
- water-drain from one lot to another, 46.
- withdrawing, from sale, 171.

LUNATIC,

- trustee becoming, after contract, 385.

MACHINERY,

- a non-essential adjunct, 182.
- mortgagee may not sell, apart from the land, 441.

MAGISTRATES,

- order to demolish under Metr. Building Act 1885 . . . 345.
- refusal by, to give interim protection, 397.

MANOR,

- finer, misrepresentation as to, 7, 74, 118, 284.
 - payable before completion, V. entitled to, 338.
- quit rents misstated on sale of, 93.
- trustees selling, and omitting to mention quit rents, 439.
- V.'s mistake as to rights comprised in, 55, 59.

MAP, 43—48. *And see* PLAN.

MARKET PRICE,

- price on re-sale taken to be, 133.

MARKETABLE TITLE, 191, 231, 243.

MARRIED WOMAN,

- acknowledgment by, want of, 229.
- and husband selling, 100.

MATERIAL. *And see* **ESSENTIAL.**

misrepresentation, 67—77.

proof that misrepresentation is, 72, 75.

MATERIALS.

sale of building, is within Statute of Frauds, 446.

MEASURE OF DAMAGES, 133, 134.**MEASUREMENT.** *See* **ACREAGE.****MEMORANDUM,** 446—459.

absence of, does not entitle P. to recover deposit, 459.

essential matters must be inserted in, 450—454.

facts known to P., 456.

incorporation of, with conditions, 455.

parties, description of, what sufficient, 450—452.

reference to other document, 452.

signature of, what sufficient, 447—449.

stamping of, 456.

MEMORIAL.

certified copy of, is not sufficient evidence of deed, 400.

registered, is secondary evidence of deed, 400.

MIDDLESEX REGISTRY,

condition as to non-registration in, 228, 261.

memorial is evidence of contents of deed, 400.

registration in, P. bears expense of, 412.

MINE,

fault in, concealed by rubbish, 25.

non-existence of, presumed, 196.

on agreement for lease of, time is essential, 303.

parol agreement to relieve, from flooding, 143.

want of title to part of, non-disclosure of, 39, 63.

worked before by V. and abandoned, 34.

MINERALS,

absence of title to,

compensation for, 118—120, 282, 283, 365.

condition binding P. to assume conveyance of, 222.

essential defect, 91.

immaterial, if there are no minerals at all, 75, 91, 196.

in residential neighbourhood, 120, 271.

is not a case of "no title at all" (*qu.*), 271, 312, 359.

justifies P. in rescinding at once, 271.

on sale of copyholds, 36.

with agreement to enfranchise, 214.

enfranchised copyholds, 51, 69.

agreement for lease of, no warranty, 3.

misrepresentation as to seam of coal, 25.

moiety of, sp. perf. of agreement to lease, 100.

price of, payable by instalments, form of conveyance, 393.

royalties belonging to V., 338.

trustees selling, separately, require leave of Court, 433.

MINING CUSTOMS, 38.**MISCONDUCT,**

P. guilty of, may yet object to puffer, 169.

MISDEMEANOUR,

concealment of incumbrance is a, 65.

W.

K K

MISDESCRIPTION. *See also* AMBIGUITY; COMPENSATION; FRAUD;

MISREPRESENTATION; NON-DISCLOSURE.

affecting identity of property, 81.

only portion of estate sold, 93, 94.

covered by condition for rescission, when, 356—358, 361—365.

dans locum contractui, 67—77.

essential, effect of, on condition as to compensation, 287, 295.

what, 78—94.

essentiality of, burden of proof as to, 80.

decided at hearing or in chambers, 81.

may be shown by terms of contract, 79.

examples of, 1—6.

material, what, 72—77.

materiality of, burden of proof of, 72.

neutralising effect of notice, 26—28.

patent defects, 24.

of acreage, 4, 73, 101, 252.

copyhold as freehold, 82.

county, 88.

cultivation, 89.

depth, 4.

determinable lease, 73.

distance from nearest town, 88, 290.

enfranchised copyhold, 82.

finer, 18, 74, 118, 284.

freehold as copyhold, 82.

frontage, 87, 90, 299, *Adl.*

house as "brick built," 16, 89.

land as "building land," 25, 287, 290, 364.

land tax, 121.

leasehold as freehold, 82.

life estate as fee, 84.

life tenant's age, 93, 291.

health, 16, 69.

occupation of property, 84.

physical condition, 88.

previous attempt to sell, 19.

profits, 4, 19, 93, 108, 118.

quantity, 4, 73, 85, 101, 252.

rack rent as ground rent, 74, 290.

rates and taxes, 70.

redeemable annuity, 39.

rent for user of garden as "ground rent," 2, 26, 84, 156.

rental, 2, 74, 287.

rent-charge as freehold, subject to rent-charge, 84.

repairs, 16, 24, 25, 89.

reversion, 84, 93, 230.

right of common for sheep, 84.

situation, 88.

solvency of grantor of annuity, 17.

tenancy, 17.

tenure, 73, 81—84, 281.

term of lease, 42, 73, 85, 295.

timber, 4, 89, 120.

tithes, 90.

under-lease as "lease," 41, 73, 83, 281.

water supply, 5, 89.

P. not deceived by, 67—72.

influenced by, 72—77.

verbal statement correcting, 140, 147.

MISLEADING

- appearance of property, 44.
- conditions, 222, 232—234.
- correct description, 6.
- statements, 4—7, 11—13, 17.

MISREPRESENTATION, 10—29.

- agent making a, 29, 64.
- as to attempt to sell, 35.
- other offers, 19, 64.
- by conveyancing counsel, V. responsible for, 443.
- dans locum contractui*, 67—77.
- definition of, 10.
- dehors* the contract, 10.
- distinction between, and non-disclosure, 10.
- essential, 78—94, 287, 295.
- fraudulent, 60, 153, 287, 356.
- implied, 14, 15, 17, 22.
- innocent, becoming fraudulent *ex post facto*, 61.
- negligence of P. immaterial, 70.
- notice is excluded by, 11, 26—28.
- objection to, is not "objection to title," 269.
- of intention, 20—23.
- law, 19, 20, 63.
- opinion, 15—19.
- parol evidence admissible to prove, 147.
- patent defects, effect of, in case of, 24, 25.
- plan, omission to mark footway on, is a, 44.
- P. not deceived by, 67—72.
- influenced by, 72—77.
- silence of V. amounts to, when, 13, 14, 54.
- summons, no jurisdiction to try, on, 128.

MISSING DOCUMENTS, 400.

MISTAKE, 52—59.

- agent's, more leniently treated than V.'s, 104.
- common, definition of, 56.
- examples of, 58.
- P. entitled to rescind after completion, 56—59, 154.
- relieved from conditions, 235, 272.
- condition inserted by, 161.
- interest payable, where delay caused by V.'s, 319, 320, 323.
- of law, no ground for relief, 58, 59.
- parol evidence admissible to prove, 139.
- P. generally not relieved on ground of his own, 52—54.
- making, as to which lot was being sold, 53.
- trusting to his own knowledge, 54.
- time for completion extended under, 350.
- unilateral, usually no ground for relief, 52, 55.
- V. generally not relieved on ground of his or auctioneer's, 55.
- knowing of P.'s mistake, 54.

MIXED

- freeholds and copyholds, 251, 253.
- leaseholds, 251, 253.

MOCK

- biddings, 166.

MOIETY,

- ambiguous statement as to rent of, 140.
- devise of, inference that testator had only moiety, 200.
- where lessor has only, abatement of rent, 100, 116.
- V. has only, abatement of price, 100, 102, 116.

MORTGAGE,

- condition as to, 227, 230.
- discovered by P. searching register, 218.
- equity of redemption purchased by mortgagee, set-off of interest, 328.
- exceeding purchase money, 95.
- is a removable defect, 275.
- mention of, in conditions insufficient, 49, 157, 227, 230.
- misleading statement as to former, 6.
- misstatement of interest, 2.
- of preliminary contract for lease, 243.
- omission to mention, 38, 95.
- on sale subject to, what covenants may be required, 390.
- P. is entitled to keep, on foot, 377.
- undisclosed, application of purchase money to paying off, 95.
- V. selling to pay off, time essential, 303.
- V.'s refusal to pay off, is unreasonable, 366, 367.

MORTGAGEE,

- misleading condition as to previous sale by, 233.
- paying P. compensation for blunder, liable to account, 106.
- receiving cheque for deposit, 172.
- selling after foreclosure, 199, 377.
 - under power, depreciatory conditions, 440.
 - improperly, no sp. perf., 199.
 - mortgagor's concurrence cannot be required, 379.
 - no injunction unless debt paid into Court, 441.
 - part of price allowed to remain on mortgage, 441.
 - P. can rescind if no notice given to mortgagor (*qu.*), 313, 314.

MORTGAGOR,

- concurrence of, on sale by mortgagee cannot be required, 379.
- puffing mortgagee's sale without authority, 169.

MOTIVE

- of P. in purchasing may be material, 77, 79.
 - reseinding is immaterial, 76.
 - except where defect *prima facie* immaterial, 77.
- V. who has made misstatement, 61.

MUNIMENTS. *See* TITLE DEEDS.**MUTUALITY, 310.**

- in case of part performance, 458.

NAME,

- identity of person presumed from identity of, 196.
- of lessee wrongly stated, 74.
- occupier wrongly stated, 84.
- V. and P. must be inserted in contract for sale, 450.

NEGATIVE,

- deeds which are only, evidence, acknowledgment as to, 405.
- proof of, 193.

NEGLECT,

- V. is liable for, of property, 350

NEGOTIATIONS,

- effect of, on V.'s rights under condition for rescission, 371.
- expenses of, not recoverable by P., 136.

NO TITLE AT ALL,

- effect of V. having, 234, 270, 311, 359, 418.

NOMINEE,

- P. may take conveyance to, 378.

NON-DISCLOSURE, 30—39.

- distinction between, and misrepresentation, 10.
- of brothel, 32.
- claims, fraudulent, 63.
- defects in title, 36, 226.
- facts other than physical defects, 35.
- mortgages, 38, 227.
- party-wall notice, 39.
- physical defects, 31.
- power of re-entry on breach of covenant, 37.
- restrictive covenants, 39, 74, 227.
- V.'s knowledge when material, 30, 31.

NON-ESSENTIAL

- defect, what, 78—94.
- relief for, in case of fraud, 60, 285.
- in other cases, 78, 79, 279.

NOTICE, 49—51, 246—250.

- appropriation without, to V., insufficient, 331.
- as between P. and third parties, 244.
- derived from P.'s occupation of the property, 50.
- effect of, excluded by agreement to give good title, 213.
- misrepresentation, 26—29.
- partial and misleading statement, 248.
- statement that V. has good title, 213.
- explaining an ambiguity in the particulars, 51.
- on condition for rescission, 358.
- fixing time for completion, 301, 304—307.
- delivery of supplemental abstract, 263, 305.
- of apportionment of paving expenses, 345.
- appropriation of purchase money, 329, 331.
- breach of covenant, 50.
- contents of lease, 49, 50, 247, 426.
- covenants, through knowledge of estate, 250.
- documents, condition as to, 246—250.
- V. must give opportunity of inspection, 249.
- enfranchisement, not notice of title to minerals, 51.
- facts invalidating lease, 193.
- stated in conditions, when, 42, 156.
- particulars, 49.
- plan, 43.
- incumbrances mentioned in conditions, none, 49, 157.
- judgment, doubt whether V. had, 193.
- lessor's title, where P. joint lessee with V., 212.
- minerals, on sale of enfranchised copyholds, none, 51.
- occupation is notice of occupier's rights, 244.
- not as between V. and P., 50.
- rent, through notice of lease, 49.
- restrictive covenants, prior owner having no, 193.
- state of property, condition as to, 284.

NOTICE—*continued*.

- of tenant's right to fixtures, 177.
- under-lease being under-lease of part only, 247, 248.
- party-wall, non-disclosure of, 39.
- paving, cost of complying with, 344—347.
 - non-disclosure of, immaterial, 39, 76.
- P. giving, to complete, waives objection, 274.
- under condition for rescission, 369.
- without depositing in bank, insufficient appropriation, 329.

OBJECTION. *And see* REQUISITION.

- to title, claim for compensation is not, 357—359, 361—365.
 - not covered by conditions, 215—226.
 - requisition may be, 374.
 - what is, 269.

OCCUPATION,

- cellar comprised in C.'s lease, but not in C.'s, 50, 185.
- misdescription of, 120, 140, 287, 313.
- not notice of lease or tenancy for life, 50.
- P.'s, of property, misrepresentation as to dimensions, 24, 69.
- "recently in the, of F.," 335.
- where lessee purchases reversion, 50.

OCCUPATION RENT,

- by P. where sale set aside, 155, 337.
 - V. if in default, 342.
 - V. implied by words "rents and profits," 342.
- interest on deposit set off against, 127.

OFFER,

- misrepresentation as to previous, 19, 64.

OFFICE COPIES

- of instruments upon record, 399.

OFFICIAL RECEIVER

- does not covenant for title, 384.

OMISSION, 30—39. *And see* NON-DISCLOSURE.

- meaning of word, in condition for compensation, 285.

ONUS. *See* BURDEN OF PROOF.

OPINION,

- adverse, of conveyancer does not make title doubtful, 206.
- expert giving, not liable to P., 15.
- misstatement of expert's opinion, ground for relief, 15.
- statement of, distinguished from statement of fact, 15, 16.
- true statement of wrong, irrelevant, 15—19.

OPPORTUNITY

- for inspection by P., 71, 249.

OPTION

- of lessor to determine lease, non-disclosure of, 39.
- purchase given by will, 210.
 - in lease, 220.

ORNAMENTAL

- timber, 8, 89, 276, 352

OUTGOINGS,

- allowed to P. rescinding after completion, 155.
- apportioned, when, 343.
- discovered after conveyance, 346, 347.
- do not include loss in carrying on business, 344.
- express condition as to, applies after completion, 347.
- "from" a given date, *Add.*
- include current rent, on sale of leaseholds, 343.
 - fire insurance, on sale of leaseholds with covenant to insure, 344.
 - paving expenses, when, 344—347.
- misrepresentation as to, 70.
- "up to" a given date, *Add.*
- V. liable for, till good title shown, 343.
- where no day fixed for completion, 343.
- sale set aside after conveyance, 155.

OUTSTANDING LEGAL ESTATE,

- cost of getting in, 257, 413.
- P. compelled to complete without, when, 256.

OWNER,

- sufficient description of V., 452.

OWNERSHIP,

- P.'s acts of, amount to acceptance of title, when, 275.

PARCELS,

- conveyance *ad medium filum via*, 382.
- deficiency, in title deeds, 252.
- description of, in deeds, loose or conflicting, 250, 251.
- how to be described in conveyance, 382.

PARENT AND CHILD,

- fraudulent appointment, 200.
- suspicion of undue influence, 198.

PARK,

- no title to land opposite gates of, 88.

PAROL

- agreement that V. shall pay rent, 342.
- contract. *See* MEMORANDUM.
- evidence. *See* EVIDENCE.
- extension of time, 150.
- misrepresentation, 10, 147.
- statement correcting misdescription, 140.
 - informing P. about V.'s title, 141, 142.
- undertaking by V., 143, 145, 146.
- variation, 139—151.
 - P. seeking sp. perf., 144.
 - suing for damages, 145.
 - deposit, 145.
 - sp. perf. *with* or *without*, at defendant's election, 145.
 - subsequent, not enforced unless part performance, 149.
 - V. seeking sp. perf. *with*, 139.
 - without*, 143.
- waiver of requisitions, 151.
 - V.'s right to rescind, 150.

PART. *And see* SHARE.

essential, of property sold, lacking, 86.

PART PERFORMANCE, 457—459.

ancillary act is not, 457.

doctrine of, applies to a company, 458.

expenditure on land is, 457.

in respect of *one* lot, 458.

of subsequent parol variation of written contract, 149.

taking possession is usually sufficient, 457.

PARTIAL

performance with abatement, 99—122, 279—299.

PARTICULARS,

alteration of, 142, 148.

description of property in, V. bound by, 55.

“first edition,” 53.

misdescription in, not cured by conditions, 156.

reference to plan, 43.

office of, is to describe the property, 156.

P. has notice of facts stated in, 49.

PARTIES

to conveyance, 378.

PARTNER,

purchase from, 211, 262.

PARTNERSHIP,

P. of share in, must indemnify V. against liabilities of, 390.

PARTY WALL,

inference that wall is (*qu.*), 3.

notice ought to be mentioned, 39.

on sale in lots, 427.

PATENT DEFECTS, 24—26.

PATH. *See* ROAD.

PAVING

expenses, borne by whom? 344—347.

notice, non-disclosure of, 39, 76.

V. reserving right to comply with, 347.

PAYMENT

into Court does not entitle P. to possession, 334.

relieve P. from paying interest, 330.

to keep down incumbrances, 95, 102.

of deposit. *See* DEPOSIT.

purchase money, 314.

by instalments, 309, 315.

is not part performance, 458.

P.'s right to rescind not barred by, 152, 272.

to V.'s solicitor, 316.

“quarter-day before day of,” 334.

PEDIGREE,

condition as to, 234.

falsification of, 65.

PENALTY. *And see* DAMAGES.

default in payment of one instalment, 316.
deposit is not a, 416.

PENCIL,

signature with, 447.

PEPPERCORN

rent, Conv. Act, 1881, does not apply to, 258.

PERFECT ABSTRACT, 264, 268. *And see* ABSTRACT.

PERFORMANCE. *See* PART PERFORMANCE ; SPECIFIC PERFORMANCE.

PERIOD

for which title must be shown, 237—244.

PERSONAL REPRESENTATIVE

is sufficient description of V., 451.

PERUSAL

of draft conveyance by grantors, V. bears cost of, 411.

PHYSICAL

condition of property, defects in, 31—34.

PLACE

for verification of abstract, 402.

PLAN, 43—48.

adjacent property delineated on, 47, 48.
building estate delineated on, 46.
copy, on abstracted deed forms part of abstract, 265, 410.
footway marked as a turnpike road, 45.
 not marked on, 44.
gateway on, 44.
in conveyance, P. entitled to, when, 382.
inference as to soil of path in rear of plots, 45.
measurement by scale on, in lease, 251.
misdescription not corrected by, 27, 43.
 but V. not entitled to compensation, 284.
notice of facts stated in, P. has, when, 43.
roads. condition of, indicated by, 46.
 intended, delineated on, 22, 45, 46.
 marked, but no statement as to third persons' rights, 44.
 omitted in, 44.
trees delineated on, 43.
versus particulars, 43.
watercourse delineated on, 46.

PLEADINGS

on sale by order of Court should be abstracted, 265.

POLICY. *See* INSURANCE.

PORTION

charged on property sold, no compensation for, 118.
 no indemnity, 125.
essential, no title to, 86.
misdescription affecting only, 93.

POSSESSION,

condition as to, 313, 333—337.

means possession with good title, 334.

vacant possession, when, 334.

time from which P. is to have, 333.

damages for V.'s delay in giving, when, 133, 334—336.

distinction drawn in contract between "completion" and, 336.

evidence of, where identity doubtful, 250.

P. not entitled to, before paying purchase money, 333.

last instalment, 334.

on paying purchase money into Court, 334.

P. only entitled to the *right* to take, 336.

purchaser taking,

before payment of purchase money,

compensation to, for improvements, when, 353.

doing irremediable damage, accepts title, 276.

is a trespasser, 333.

must go out, or pay purchase money into Court, 336.

reinstate property altered by him, 352.

when liable to pay occupation rent, 337.

before title shown,

must pay interest on purchase money, 326.

waives objections to title, when, 274.

forcible or clandestine, waives objections, 275.

shows defect not essential, 80.

P.'s claim for, not covered by condition for rescission, 361.

statutory declaration, condition making, proof of identity, 254.

taking, does not bar P.'s right to rescind, 152.

is usually part performance, 457.

tenant too ill to be moved out, V. not liable, 336.

time for, construed as time for completion, 301.

title by. *See* POSSESSORY TITLE.

vacant, 334.

V. may escape liability for deterioration by offering P., 350.

V. not in, at time of contract, damages for loss of bargain (*qu.*), 131.

where purchase money payable by instalments, 334.

time is of the essence, 336.

POSSESSORY TITLE,

P. is bound to accept, 194.

but may require forty years' title, 238.

V. having, not a case of "no title at all," 270.

POWER,

appointment under, not good root of title (*qu.*), 237, 242.

fraud on, contract which would be, not enforced, 105.

suspicion of, 200, 201.

lease under, title in case of, 243.

of corporation to convey, 243.

re-entry. *See* RE-ENTRY.

sale in settlement directed by will, 209.

with consent of sons and daughters, 210.

POWER OF ATTORNEY,

delay through relying on insufficient, "wilful default," 322.

PRE-EMPTION,

adjoining owner's right of, in case of turnpike, 96.

vendor's right of, under local Act, 209.

PREJUDICIAL.

sale, to third persons, not enforced, 104, 113.

PREMIUMS

on fire insurance are outgoings, when, 344.

PREPARATION

of agreement, expenses of, recoverable by P., 135.

conveyance, expenses of, when recoverable by P., 135, 136.

PRESERVATION

of property by Court, pending litigation, 353.

V. executing repairs necessary for, 354.

PRESUMPTION, 195—201.

as to *bona fides*, 197.

child-bearing, 196.

extrinsic facts, 196.

forfeiture, 199.

non-existence of mines, 196.

notice, 193.

recited title deeds which have been lost, 196.

validity of appointments, 200.

voluntary conveyances, 201.

PRICE, 453. *And see* PURCHASE MONEY; UNDERVALUE.

PRINCIPAL. *See* AGENT.

PRINTED

name of V., when a sufficient signature, 447.

particulars, altered in writing, 148.

PRIOR TITLE, 241.

PROBABILITY

of litigation makes title doubtful, 189.

statement of matters of, 18.

PROBATE,

office copy of, must be produced, 399.

PRODUCTION

of title deeds, 399—408. *And see* TITLE DEEDS.

PROFITS, 337—342.

after date for completion, P. is entitled to, 339.

before date for completion, V. is entitled to, 338.

compensation for misstatement of, 108.

do not include benefit of covenant to repair, 339.

guarantee of, 9, 18.

include crops cut before completion, 338.

finer on sale of manor, 338.

loss of, through V.'s delay, 334—336.

misstatement as to, 4, 19, 93, 108, 118.

"of such parts as are let," 338.

on re-sale, P. not entitled to share in, 421.

speculative statement as to, 18.

what are, 338.

PROJECTING ROOM, 32.

PROOF. *See* EVIDENCE; BURDEN OF PROOF.

“ PROPRIETOR.”

sufficient description within Statute of Frauds, 452.

PUBLIC HEALTH ACT, 1875,

notices and orders under, 344—347.

PUBLIC HEALTH (LONDON) ACT, 1891.

effect of notice under. *Add.*

PUBLIC HOUSE.

fixtures and furniture essential adjuncts (*qu.*), 182.

“ free,” 1.

lease of, “ usual covenants ” in, 28.

lessor refusing consent to assignment of leasehold, 189.

licence, 348, 397, 398. *And see* LICENCE.

loss by V. in carrying on, is not an outgoing, 344.

restrictive covenants against user as, 47.

sold as going concern, time essential, 303.

with only off-licence, misdescription (*qu.*), 1.

PUFFER.

bidding by, and P. only, 164.

employed by V. and not bidding, 56.

employment of, 164, 168.

P. objecting to, need not have “ clean hands,” 169.

stranger acting as, without authority, 169.

PUFFING STATEMENTS, 14—18.

PURCHASE MONEY

apportioned on joint sale, 432.

appropriation of, to escape interest, 329—333.

expense of raising, not recoverable by P. as damages, 135.

incumbrances exceeding, 95.

paid off out of, in Court, 152, 153.

interest on, when recoverable by P. as damages, 134.

is of the essence on a sale, 181, 453.

payable in instalments, 309, 315.

payment of, 314.

into Bank in joint names, 316.

Court, does not entitle P. to possession, 334.

to keep down incumbrances, 95, 102.

is not part performance, 458.

to V.'s solicitor, 316.

P. unable to procure, V. is not in default, 322.

P.'s right to rescind, not barred by payment of, 272.

V. may sue for, without executing conveyance, 315.

QUANTITY. *See* ACREAGE; COMPENSATION.

QUEEN ANNE'S BOUNTY,

undisclosed charge in favour of, 35.

QUIT RENTS,

condition as to conveying subject to, 384.

general condition as to, used by trustees, 436.

must be mentioned by V., 39.

subject of compensation, 91, 93.

trustee selling manor without mentioning, 439.

RABBITS,

verbal agreement to destroy, 146.

RACK RENT

misdescribed as ground rent, 74, 290.

RAILWAY COMPANY.

condition as to sale of surplus land by, 232.

selling surplus land, is not a trustee, 431.

RATE

of interest payable by P., 328.

sale of equity of redemption, misdescribing, 2.

RATES. *See* OUTGOINGS.

covenant that lessee shall pay, is "usual," 27.

drainage, misstated, 284.

misrepresentation as to amount of, 70.

RATIFICATION

by mortgagor, of sale by mortgagee, 313, 314.

principal, of sale made without authority, 314.

REASONABLE

expectation of V., that defect would be cured, 358.

notice fixing time for completion, 305—307.

opportunity of inspection of documents, 249, 250.

request of P. for information, 368.

time allowed for completion, 301, 309, 310.

for delivery of abstract, 263.

unwillingness to answer requisitions, 365—368.

REBUILDING

in case of fire, 348, 349.

RECEIPT

for purchase money, condition as to trustee's, 380.

rent, made evidence of performance of covenants, 222, 257.

signed by person other than lessor, 260.

RECEIVER

appointed to protect property from deterioration, 353.

work coal, 353.

where V. and P. cannot agree as to letting, 341.

RECITALS.

abstract ought not to be compiled from (*qu.*), 265.

condition making *all*, evidence is depreciatory, 436.

in abstract, of document prior to abstract, 241.

in conveyance, V. may object to, if untrue, 381.

not otherwise, 381.

made conclusive evidence, 256.

not sufficient abstract of recited document, 265.

of deeds, presumption that they contain nothing adverse to the title, 196.

intention, may amount to contract, 21.

lost deeds, 401.

seisin, 256.

twenty years old, made evidence, 223, 254—256.

RECORD.

instruments upon, production of, 399.

when included in covenant for production, 406.

RECOVERY

of deposit, 126—129.

RECTIFICATION

of contract, to insert parol variation, not granted, 142.

REDEMPTION,

equity of, being sold, interest on mortgage misstated, 2.

RE-ENTRY,

power of, non-disclosure of, 37, 248.

P. of leaseholds has notice of, when, 37, 248.

V. entitled to insert, when, 392.

what "usual," 28, 29.

REFERENCE

to conditions, 456.

contract, in a letter, 449.

lease, 7. 246—250.

REFUSAL

to answer requisitions may entitle P. to rescind at once, 314.

V.'s wilful, damages for, 131, 335.

REGISTERED LAND,

covenants for title on sale of, 388, 389.

delivery of certificate, 404, 405, 430.

title to, 245, 246.

REGISTRATION,

covenant for, of assignments with lessor "usual," 28.

in Middlesex, condition as to, 228, 261.

expense of, 410, 412.

of previous assignments with lessor, 311.

RELEASE, 273. *And see* REQUISITIONS, WAIVER OF.RELIEF. *See* RESCISSION ; COMPENSATION ; DEPOSIT ; DAMAGES.

after completion, 152—155.

in case of parol variation, 139—151.

REMAINDER. *And see* REVERSION.

destroyed before contract, P. is relieved, 58.

"of term of 54 years," ambiguous expression, 42.

vesting in possession before contract, V. is relieved, 58.

RENEWABLE LEASEHOLDS,

compensation for misdescription as to, 112, 121, 282, 286, 291.

RENT. *See* GROUND RENT ; QUIT RENT ; RACK RENT.

abatement of, on contract to grant lease, 100, 116.

account of, against V., 341.

after date for completion, P. entitled to, 339.

apportionment of, between V. and P. till completion (*qu.*), 337, 340, 343.

on sale in lots, 426.

arrears of, received by V. after date for completion, 342.

before date for completion, V. entitled to, 337.

"clear yearly," 2.

condition that P. shall have, when V. in occupation, 342.

V. may take either, or interest, 340.

V. shall have, excludes his right to interest, 316.

improved, described as ground rent, 74.

misleading statement as to, 6.

misstatement of, 2, 74, 93, 287.

notice of lease, is not notice of, 49.

RENT—*continued.*

- occupation, when payable by P., 155, 337.
V., 342.
- of moiety, ambiguous statement as to, 140.
- omission of, from particulars, not cured by reference to lease, 49.
- rack, described as ground rent, 74, 290.
- raised by V. after contract of sale, 8.
- receipt for, made evidence. 220, 257, 260.
- received by V., set off against interest payable by P., 329, 444.
- reduction of, by V. after contract, 341.
- remission of, V. need not mention, 35.
- wilful default, P. charged on footing of, 155.
V. when charged on footing of, 341, 342.

RENT-CHARGE,

- compensation for, 117, 124.
- described as "frechold, subject to rent-charge," 84.
- distinction between, and quit rents, 91.
- indemnity against, 124.
- large, essential defect, 91.
- non-disclosure of, 39, 117, 124.
- tithe. *See* TITHES.
- what is a, 2.

REPAIRS,

- by P. rescinding after completion, 155.
where V. rescinds because of P.'s default, 353.
- V. recoverable from P., 354.
- covenant for, benefit of, in lease expiring before completion, 339.
mentioned, but no one liable, misleading statement, 5.
- effected by lessee before exercising option to purchase, 353.
- lessee liable for, is "usual," 28.
- misrepresentation as to, 16, 24, 25, 89.
- non-execution of, not covered by condition for rescission, 361.
- notice to V. by lessor, non-disclosure of, 38.
- of wall, liability as to, not mentioned in contract, V. inserting in conveyance, 360.
- removal of buildings, subject to a covenant to repair, 32.
- undertaking as to, implied, 9.
- V. liable for, when, 350, 351.
requesting P. for necessary funds, 351.
- verbal agreement as to, 146.

REPRESENTATION. *And see* MISREPRESENTATION.

- estoppel by, 21, 23.
- in written contract, V. compelled to make good, 95—98.

REPUDIATION OF CONTRACT,

- abandonment of land may amount to, 417.
- by P.'s trustee in bankruptcy, 419.
- damages for P.'s, though V. not entitled to sp. perf., 312.
- failure to pay an instalment is not necessarily, 309.
- no forfeiture of deposit except in case of, 416.
- protracted delay is constructive, 417.

"REQUIRE,"

- condition that P. shall not, 217.

REQUISITIONS,

- answering, is not waiver of right to rescind, 371.
- as to conveyance, 269, 361.
defects not disclosed by the abstract, 268, 359.

REQUISITIONS—*continued*.

- as to information reasonably asked for, 368.
- condition as to waiver of, 267—273.
 - P. not precluded by, from recovering deposit, when, 271, 272.
 - V. waives, by entertaining after time fixed, 272.
 - where conditions misleading, 272.
 - defect not disclosed by abstract, 267, 268, 356, 359.
 - fraud or common mistake, 272.
 - V. has "no title at all," 270—272.
 - only possessory title, 270.
- condition precluding, does not preclude objections *aliunde*, 216—223.
- covered by condition for rescission, when, 357—365.
- equivalent to "objections," when, 374.
- further, 269, 270.
- P. insisting on, 369.
 - may make, though not entitled to abstract, 276.
 - waiving, may require verification of abstract, 276.
 - withdrawing, after insisting on, 370, 372.
- repetition of, is "insisting on," 370.
- time for, essential, 267.
 - when abstract delivered late or imperfect, 268.
- V.'s refusal to answer, may entitle P. to rescind at once, 314.
- waiver of, apart from condition, 273—277.

RE-SALE, 419—424.

- by P. *See* SUB-SALE.
- condition as to, trustees not bound to enforce, 438.
- deficiency on, amount of, how ascertained, 420.
- deposit forfeited, though V. suffers no loss on, 421.
- in absence of condition, 419.
- profit made on, P. has no right to share in, 421.
- special condition as to, 168.
- V. may retain the land instead of re-selling, 421.

RESCISSION

by purchaser,

- after completion, 152—155.
- barred by P.'s knowledge of defect, 211.
- before time fixed for completion, 310—314.
- notwithstanding condition for compensation, 287—291.
- on ground of absence of title to minerals, 271.
 - essential misdescription, 78.
 - fraud, 60.
 - non-delivery of abstract, 263.
 - non-production of title deeds, 399.
- sale of two lots, where title to one lot defective, 87, 88.
- waiver of right of. *See* WAIVER.

by vendor under condition, 355—375.

- abstract, effect of delivery of imperfect, 267, 356.
- claim for compensation covered by condition, when, 361—365.
- condition does not absolve V. from duty of delivering abstract, 366.
 - referring to "matters in particulars," 362.
 - "objections to title," 357, 361, 362—365.
 - "requisitions as to compensation," 361.
 - "requisitions as to conveyance," 360.
- construed as applying only to objections to title, when, 362.
- defects known to V., covered by condition, when, 358.
 - not appearing in abstract, 267, 356, 359.
- deficiency in acreage, covered by condition, when, 362.

RESCISSION—*continued*.**by vendor under condition**—*continued*.

- effect of condition where abstract imperfect, 267.
 - time is essential, 368.
 - V. guilty of fraud, 356.
 - has no title at all, 359.
 - makes attempts to remove the objection, 371.
- fraudulent use of condition, 356.
- judgment, effect of, 373.
- jurisdiction of Court as to costs, 373.
- litigation, effect of pending, 372.
- locus pœnitentiæ*, need not be given to P., 370.
- misrepresentation covered by condition, when, 356—358, 361—365.
- negotiations, effect of, 370, 371.
- notice must be given, 369.
 - validity of, determined on V. and P. summons, 375.
- objections to title covered by condition, what, 361.
 - on the ground of P.'s default, 369.
- P. insisting on requisition, 369, 370.
- P.'s claim to possession, 361.
- reasonableness of V.'s refusal, 365—368.
- reasons for refusal, V. need not give, 365, 370.
- repairs, non-execution of, 361.
- requisitions as to conveyance covered by condition, when, 360, 361.
- time, V. need not give further, 370.
- trustees may use the condition, 438.
- under sale by the Court, 131, 357, 369, 443.
- unwillingness of V. to remove objections, 365—368.
- V. rescinding and then wishing to complete, 373, 374.
- waiver by P. of requisition, 370.
 - by V. of right under condition, 370.
- what steps V. must take to rescind, 369.
- parol, of written contract, 150.

RESERVATION,

- intended, must be clearly expressed, 8.
- not implied by calling adjoining land "building land," 8, 48.
- of part of estate sold subject to restrictions, 47.
 - right of way, though not expressed, 44.
- right to bid, 163—166.
- to the Crown, 121.
- unauthorised sale by auctioneer without, of right of way, 148.

RESERVE, 163—169.

- sale with, 163.
 - no other bidders but puffer and P., 164.
- sale without, 166.
 - auctioneer may not take bid from V., 167.
 - but "with liberty to bid," 166.
 - private agreement by V. with stranger, 166.
 - unauthorised, binds V., 166.
 - V. may not bid by self or agent, 166.
- sale without stipulation as to, 167.
 - P.'s misconduct, effect of, where V. bids, 169.
 - sale voidable at P.'s option, if V. bids, 167.
- trustee may and should sell with, 431.

RESIDENCE,

- proviso for lessee's, is not "usual," 28.
- purchase of house for, time essential, 304.
- W.

RESTRICTIONS. *And see next heading.*

- intended, 47.
- trustees may sell subject to new, 439.

RESTRICTIVE COVENANTS,

- adjoining land of V. on sale of building estate, 47.
- are essential defects, 92, 291.
 - irremovable defects, 275.
- burden of proof of immateriality of, 75.
- compensation cannot be assessed for, 122.
- in deed prior to commencement of title, 219.
- insertion of, in conveyance, 383, 389, 390, 391.
- non-disclosure of, 39, 74, 227.
 - when immaterial, 74.
- on sale in lots, 392, 427.
- proof that prior owner had no notice of, 193.
- P.'s knowledge of, 212, 213.
- title shortened to avoid disclosing, 242.
- V.'s knowledge of, 227.

RETENTION

- of abstract, 274, 308. *And see* ABSTRACT.
- land by V. instead of re-sale, 421.
- possession by P. may be waiver of objections, 275.
- title deeds by V., 403, 405.

RETRACTING

- bidding, 170.

REVERSION.

- age of life tenant, loose description of, by mortgagee selling, 439.
 - misdescription of, on sale of, 93, 291.
- annuity charged on, misleading condition as to, 233.
- apportionment of purchase money on sale of life estate and, 432.
- condition binding P. to assume validity of lease, 225.
- contingent, 108.
- death of life-tenant before sale, 58.
- described as estate in possession, 84, 113.
- prior sale of, by trustees, to P. of life estate, afterwards selling at profit, 198.
- succession duty, on sale of, 37.
- time for completion essential, on sale of, 303.
 - from which interest is payable, 326.
- title to commencement of, 241.

RIGHT

- of common, is an essential defect, 91.
 - misdescription as to, 84.
- of way. *See* ROAD; WAY; ACCESS; EASEMENT.

RING-FENCE,

- misdescription of land as within, essential, 89.
- P.'s knowledge as to, inferred, 69.

RISK.

- P.'s, of accidents to the property, 347—349.

ROAD,

- absence of, compensation for, 98, 101, 122.
- delay in making, damages for, not granted, 335.
- delineation of, on sale plan, 44—46.

ROAD—*continued*.

- footway marked on plan as turnpike, 45.
- not marked on plan, 44.
- incomplete, described as "made up," 97, 122.
- intended, 45, 46.
- land sold bounded by, inference as to V.'s rights, 3.
- parol agreement to lay out, on adjoining land, 143.
- P. entitled to conveyance, *ad medium filum*, when, 3, 382.
- soil of intended, if no road made, 45.
- undertaking to make, 9, 45, 46, 98, 101.
- when inferred from plan, 45.
- width of new, marked on plan, 46.

ROOM,

- projecting, not part of house sold, 32.

ROOT OF TITLE, 237—244.

- loss of deed which should be made, trustees' duty in case of, 435.

ROYALTIES

- belong to V., 338.

SALE BY COURT, 442—445.

- compensation for misdescription discovered after conveyance, 277.
- completion in case of, 444.
- condition as to lessor's title, what, may be used on, 444.
- for rescission, 131, 357, 369, 443.
- that conveyance shall be settled by Judge, 378.
- date at which P.'s liability for accidental loss begins, 347.
- defect not disclosed by abstract, P. can rescind after payment, 272.
- deposit may be paid to solicitor on, 173.
- dividends on deposit in Court and invested, 127, 369.
- high standard of good faith required on, 443.
- if title doubtful, deposit paid out to P., 188.
- income tax on interest on purchase money, 333.
- interest on deposit, 126, 127.
- misrepresentation on, what damages recovered by P., 131, 135, 443.
- of leaseholds in lots, 444.
- order on P. to pay interest, 317.
- preparation of particulars and conditions, 442.
- rule in *Bain v. Fothergill* not applicable to (but *qu.*), 131.
- Statute of Frauds inapplicable to, 446.

SALE IN LOTS, 425—430. *And see* Lots.

SCHEDULE,

- P. not entitled to abstract of, not relating to P.'s land, 266.

SCHEME,

- building, 46, 392, 427—429.

SEA VIEW, 6, 23.

SEA WALL,

- expense of repairing, 2.

SEARCHES

- for judgments, expenses of, recoverable as damages, 135.
- in Ireland, expenses of, 411.

SECONDARY

- evidence of lost deed, what is, 400.

SEISIN,

- condition as to proof of, 222.
- covenant as to V.'s, 386.
- recitals as to, 256.
- statutory declaration as to, 225.

SET-OFF

- of amount of deterioration against interest, 329.
- interest on deposit against P.'s occupation rent, 127.
 - mortgage against interest on purchase money, 328.
- rents against interest on purchase money, 329, 444.
- on claim for compensation, 109.

SETTLED LAND ACTS,

- lease under, conflicting evidence as to validity of, 201.
- notice of facts invalidating, 193.

SETTLEMENT,

- abstract of, omitting covenant as to after-acquired property, 266.
- in pursuance of direction in will, 209.
- voluntary, condition as to validity of, 224.
 - makes title doubtful, 193, 201.
 - proof of no subsequent consideration, 224.

SEWER,

- public, not an essential defect, when, 92, 287.

SHARE,

- undivided, sold as entirety, 85, 86.
 - sp. perf. with abatement, 116.

SHOOTING,

- verbal agreement not to let, 146.

SHOP,

- covenant against user as, essential defect, 92.
- P. converting dwelling-house into, 352.

SIGNATURE,

- what, sufficient for Statute of Frauds, 446—449.

SILENCE,

- V.'s, amounts to representation, when, 13, 14, 54.
 - opposed to "industrious concealment," 30.
 - when auctioneer's clerk signs for him, 448.
 - P. says he cannot complete in time, 308.

"SIMILAR"

- covenants, 396.
- houses, 2.

SITUATION

- of property, misdescription as to, 88.

SIZE. *See* ACREAGE.

SOIL,

- ad medium filum*, P. expecting to get, 3
- of footpath at back of plots, 45.
- price so much per acre, 382.

SOLICITOR

- also auctioneer, payment of deposit to, 172.
- authority of, to sign contract, 449.
- concealing incumbrances is guilty of misdemeanour, 65.
- conveyance need not be executed in presence of P.'s, 397.
- deducing title subject to approval of P.'s, 213.
- deposit paid to V.'s, 172, 173.
- falsification of pedigree by, 65.
- liable for concealment by shortening title (*qu.*), 66.
- misstatement by, as to V.'s title, 29.
- mortgagee selling to his, 199.
- payment of purchase money to V.'s, 316.
- purchasing from client, proof of fairness, 195.
- suspicion of unfairness, 198.
- stakeholder of deposit, when, 172, 173.

SON.

- appointment to, 200.
- conveyance by, to father, 198.

SPECIAL CONDITIONS, 228.

SPECIFIC PERFORMANCE.

- alternative claim for, or forfeiture of deposit, 424.
- costs of P.'s action for, not recoverable as expenses, 136.
- damages granted in addition to, or substitution for, 137.
- deposit recovered in action for, when, 128.
- discretion of Court as to decreeing, 52, 102.
- distinction between V.'s action for, and P.'s action for deposit, 158, 215, 234, 278, 288, 295.
- V.'s action for, and P.'s, asking compensation, 159, 295.
- not against trustee who has no power to sell, 104.
- not so as to compel breach of prior agreement, 97.
- not where V. refuses to fulfil undertaking, 22.
- notwithstanding lessor refuses licence to assign, 398.
- of agreement to disentail, 96.
 - grant lease not enforced if fraud on power, 105.
 - guarantee profits, not granted, 9.
 - make road, granted, 9.
- parol variation, 139—151. *And see* PAROL VARIATION.
- parties to action, purchaser of other lots not necessary, 380.
- P. resisting, may prove parol agreement for compensation, 144.
- P. suing for, before V. has rescinded under condition, 372.
 - where condition allowing compensation, 291.
 - refusing compensation, 295.
- P. suing for, and resisting, distinction between, 52, 139—145.
- V. suing for, waives right to rescind, when, 372.
 - where condition allowing compensation, 285.
 - refusing compensation, 294.
- V. wishing to rescind must dismiss his action for, 372.
- where title doubtful, refused, 186.
 - V. has no title at all, refused, 158, 234, 270.
- with compensation, 99. *And see* COMPENSATION.

SPORTING,

- right of, is an essential defect, 92.
 - irremovable defect, 275.
- not a subject of compensation (*qu.*), 122.

STABLE

- no access to, 185.
- no title to, 87.
- rooms over, no title to, 282.

STAKEHOLDER,

- auctioneer is, when, 172. 173.
- V.'s solicitor is, when, 172. 173.

STAMPED SIGNATURE, 447.**STAMPS, 227, 261, 401, 456.****STATEMENT. *And see* RECITALS.**

- as to matters of probability, 18.
- detailed, misleading, 4, 12.
- misleading, distinguished from ambiguity, 11.
- P. relieved on ground of V.'s, 11. 12.
- puffing, 14—19.
- twenty years old, 223, 254—256.

STATUTES,

- Statute of Frauds (29 Charles II. c. 3).
- sect. 4 . . . 139, 169, 446—459.
- sect. 17 . . . 167, 456.
- Fire Prevention (Metropolis) Act, 1774 . . . 348.
- General Turnpike Act (3 Geo. IV. c. 126), s. 39 . . . 96.
- 1 & 2 Will. IV. c. 56 . . . 316.
- 3 & 4 Will. IV. c. 42, s. 28 (interest) . . . 129.
- Fines and Recoveries Act, 1833, s. 47 . . . 345.
- 15 & 16 Vict. c. 62, s. 8 (records) . . . 399.
- Metropolis Management Act, 1855 . . . 345.
- Metropolitan Buildings Act, 1855 . . . 345.
- 21 & 22 Vict. c. 27 (Lord Cairns' Act), 137.
- Local Government Act, 1858 . . . 345.
- 22 & 23 Vict. c. 35 (Lord St. Leonards' Act), 65, 394.
- Metropolis Management Amt. Act, 1862 . . . 346.
- Sale of Land by Auction Act, 1867 . . . 163. 166. 168.
- Judicature Act, 1873, sect. 24 (7) . . . 137.
- sect. 25 (7) . . . 309.

Vendor and Purchaser Act, 1874—

- sect. 1, length of title, 237.
- sect. 2 (i.), lessor's title, 239.
- (ii.), recitals twenty years old, 254.
- (iii.), production of deeds, 407.
- (iv.), expense of covenant for production, 414.
- (v.), retention of deeds, 403.
- sect. 3, trustees need not exclude Act, 433.
- sect. 9, procedure, 128, 138.
- Public Health Act, 1875 . . . 345.
- Settled Estates Act, 1877,—
- sect. 19, minerals, 433.

Conveyancing Act, 1881—

- sect. 3 (i.—v.), commencement of title, 239, 242, 257.
- (vi.), expenses, 401, 409.
- (vii.), abstract on sale in lots, 429.
- (xi.), effect of statutory conditions, 239.
- sect. 5, incumbrances, 95, 102.
- sect. 7, covenants for title, 385—389.
- sect. 9, acknowledgment for production, 405—407.

STATUTES—*continued*.

Conveyancing Act, 1881—*continued*.

- sect. 14, breach of covenants in lease, 83.
- sect. 16, deeds of land mortgaged, 407.
- sect. 19, sale by mortgagees, 441.
- sect. 66, trustees need not exclude Act, 433.
- sect. 70, jurisdiction of Court, 383, 444.

Settled Land Act, 1882—

- sect. 17, minerals, 433.
- sect. 45, protection of P., 195.
- sects. 53 and 54, tenant for life selling, 431.

Conveyancing Act, 1882—

- sect. 4, preliminary contract for lease, 243.
- Disused Burial Ground Act, 1884 . . . 216.
- Arbitration Act, 1889 . . . 182.
- Stamp Act, 1891 . . . 261.
- Public Health (London) Act, 1891 . . . *Add.*
- Private Street Works Act, 1892 . . . 346, 347.
- Voluntary Conveyances Act, 1893 . . . 201.
- Trustee Act, 1893 . . . 316, 433, 434, 441.
- Amendment Act, 1894 . . . 441.
- Land Transfer Act, 1897 . . . 246, 389, 404, 405, 412.

STATUTORY

- conditions have same force as express conditions, 161.
- declaration, 201, 225, 262, 400.
- duty of V. conflicting with his duty to P., 96.

STOCK,

- loss through selling out, not recoverable as damages, 135.

STRANGER

- making fictitious bids, 169.
- mortgagor is a, on sale by mortgagee, 169.

STREET. *And see* ROAD.

- parol agreement to lay out, 143.

SUB-LEASE. *See* UNDER-LEASE.

SUB-PURCHASER,

- V. may be required to convey to, 378.

SUB-SALE,

- expense of, when recoverable by P. as damages, 134.
- price on, taken to be market price, 133.
- sub-vendor entitled to prove parol agreement for, 146.
- V. compelled to convey to P.'s nominee, 378.

SUBSTANTIAL. *And see* ESSENTIAL; MATERIAL.

- effect of representation that house is, 24.

SUCCESSION DUTY,

- additional, on determination of lease, 37.
- condition not precluding P. from requiring V. to pay, 225.
- covenant to pay, on sale of reversion, 390.
- need not be mentioned on sale of remainder, 37.
- question as to, decided in absence of Crown, 208.

SUMMONS

- under V. and P. Act, 1874,
 - compensation, claim for, may be decided on, 106, 107.
 - construction of contract decided on, 128.
 - damages (*i.e.* expenses) may be recovered on, 138.
 - damages for loss of bargain, not recoverable on, 138.
 - damages for V.'s delay ought not to be given on, 138, 335.
 - deposit may be recovered on, 128, 278.
 - doubtful title, how dealt with on, 187, 188.
 - form of conveyance may be decided on, 378.
 - interest erroneously paid by P. not recovered on, 324.
 - recovered on, 127.
 - lien for deposit and interest, declared on, 127.
 - expenses, declared on, 138.
 - mistake and misrepresentation, not decided on (*qu.*), 128, 138.
 - question of title, decided on summons, when, 188, 278.
 - whether P. has accepted title, 278.
 - rescission by V. under condition, validity of, decided on, 375.
 - what order should be made on, if defect covered by conditions, 278.

SUPPORT,

- right of, on sale in lots, 428.

SUPPRESSION

- of incumbrances, 65, 66.

SURPLUS LAND,

- condition as to adjoining owners' rights, 232.
- railway company selling, is not a trustee. 431.

SURRENDER

- of copyhold, in absence of, no legal estate, 225.
- lease, agreement to procure, 214.

SURVEY,

- expense of, before examining title, not recoverable, 135.
- P. omitting, in reliance on V.'s statement, 25.

SURVEYOR,

- expense of obtaining certificate of, 411.
- mistake of, causing misstatement of acreage. 104.

SUSPICION

- of facts adverse to title, 196.
- fraud on power, 200, 201.
- mala fides*, 197.
- unfairness, 198.

TELEGRAM,

- sufficient signature within Statute of Frauds, 447.

TENANCY,

- adverse to V., must be so described, 5.
- at will, 2.
- general condition as to, 436.
- intention of tenant to determine. non-disclosure of, 35.
- misrepresentation as to, 5, 17.
- notice of, is not notice of lease, 50.
- unusual tenant right, 38, 50.
- is notice of right to tenant's fixtures (*qu.*), 176.
- V.'s duty in respect of, 340, 341.

TENANT'S

- agreement with P. as to giving up possession, 340.
- fixtures in public house may be non-essential, 182.
- notice of tenant's right to, 176, 177.
- inability to quit, through illness, V. not liable, 336.
- neglect, V. liable for, 351.
- valuation, paid by V. and deducted, 341.
- unusual agreement as to, 38, 50.

TENANT FOR LIFE,

- age of, misstated, 93, 114.
- conveyance by, with recital that trustee is selling, 198.
- covenant for title by, 384, 388.
- granting lease under S.L.A., *bona fides* of, 193, 201.
- health of, misrepresented, 16.
- occupation of, not notice as between V. and P., 50.
- offer to substitute, as V., 313.
- sale by, and remainderman, 37.
- as agent for trustees, 106.
- under Settled Land Act, 1882 . . . 431.
- delay in appointing trustees, 313.
- protection to P., 195.
- sale to, by trustees, does not make title doubtful, 199.
- sp. perf. against, refused as prejudicial to remainderman, 113.

TENANT IN TAIL,

- contract by, to disentail. sp. perf. of, 96.

TENANT RIGHT

- need not be mentioned, if usual, 38.

TENANTS IN COMMON,

- contract to sell by, one having no title, 100.
- selling to one another, no abstract of common title needed, 262.

TENURE,

- difference of, compensation for, 111, 281.
- misdescription of, essential, when, 73, 81, 82, 286, 290.
- usual incidents of, need not be mentioned, 36.

TERM OF YEARS. *And see* LEASE.

- deficiency in, 73, 85.

TIMBER,

- additional price payable for, 140, 157, 176, 425.
- compensation for, 89, 120, 352.
- condition as to, 157, 176, 425.
- copyholds and freeholds mixed, 175, 253.
- declaration as to, on *one* lot, misleading as to other lots, 425.
- injunction against P. felling, 353.
- interest on price of, 327.
- land includes growing, 175.
- misdescription of, compensation for, 120.
- misleading statement as to produce of, 4, 68.
- mistake by auctioneer as to value of, 55.
- notice of lease is notice of tenant's power to cut, 248.
- ordinary, is a non-essential matter, 89.
- unless P. buys for the sake of the timber, 79.
- ornamental, is essential on purchase of residential estate, 89.
- plan showing, 16, 43.
- P. felling, accepts title, 276.
- V. felling, P. may rescind, 8, 352.

TIMBER—*continued*.

- parol stipulation that P. must pay for, 140.
- trustees may not sell land without, 433.
 - selling life estate, not mentioning right to fell, 439.
- valuation of, condition as to, 176, 179, 181.
 - mistake by auctioneer as to, 55.
- V. may not fell, 338, 350.
- what is, 175.
- windfalls belong to P., 338.

TIME

- at which P. entitled to possession, 333.
 - P. may rescind, 301, 310, 336.
 - V. may rescind, 309, 368, 417.
- essential, when, 301—304, 304—307.
- extended by parol agreement, 150.
 - through mistake, 350.
- fixed in the alternative, 302.
- for completion, enlarged through V.'s default, 310.
 - when essential, 302—309.
 - where no time fixed, 301.
- for delivery of abstract, not essential, 263.
 - draft conveyance, not essential, 396.
 - requisitions, essential, 267.
 - extended by V.'s default, 268.
 - how computed, 268.
- from which interest is payable by P., 324—327.
 - P. is entitled to rents and profits, 339.
 - P. is liable for outgoings, 343.
- notice making, essential, 304—307.
- reasonable, what, 263, 301, 305—307.
- waiver of, essentiality of, 307—309.

TITHES,

- apportionment of, on sale in lots, 426.
 - P. cannot require, 36.
- compensation for incumbrances on, 117.
- liability to, on sale "tithe free," essential, when, 79, 90.
- need not be mentioned, 36.
- "probable amount of," 4.
- V. not compelled to buy and convey, on sale "tithe free," 97.

TITLE, 184—278. *And see* ABSTRACT.

- carelessness of V. in stating, not "wilful default," 322.
- claim for compensation is not "objection to," 357—359, 361—365.
- commencement of, 237—244, 434.
 - documents dated before, P. cannot require, 241.
 - restrictive covenants in deed prior to, 219.
 - trustees must not make, too recent, 434, 435.
- condition binding P. not to "inquire into," 218.
 - "investigate," 219.
 - "object," 219.
 - "require," 216, 217, 218.
- binding P. to accept V.'s title, 220, 221.
 - "assume," 221, 232.
 - take "such title as V. has," 235.
- capacity of P. to understand, 231.
- defect known to V. covered by general (*qu.*), 226.
- effect of, in P.'s action for deposit, 158, 232.
 - V.'s action for specific performance, 158, 232.

TITLE—*continued*.

- condition, effect of, where V. has no title at all, 158, 215, 234, 237.
 - enlarging P.'s right, 213.
 - facts stated in, if untrue, no sp. perf., 233.
 - must be proved, 161, 233.
 - giving right only to good holding title, 234.
 - possessory title, 238.
 - insufficient, through merely stating objection, 216.
 - making evidence "conclusive," 222, 223.
 - misleading, 232—234.
 - not clear enough, 226—232.
 - not covering the objection, 215—226.
 - precluding inquiry into prior title, 216—221, 240.
 - objections to defects discovered *aliunde*, 219—221.
 - requisitions on V. only, 216—219.
 - restricting P.'s right to, 214—273.
 - shortening title, must be clear, 230.
 - special, covering known defect, 228.
- covenants for, 384—389.
- defect in, covered by condition as to title, when, 215—226.
 - for compensation, when, 281.
 - for rescission, 363.
 - refusing compensation, not, 281—283.
- found out after completion, compensation for, when, 154, 291.
 - rescission, when, 56, 60, 154.
 - P.'s default, 419.
- modified after delivery of abstract, 366.
- P. electing to complete, pays interest, notwithstanding, 366.
- P. knowing of irremovable, cannot object, 211, 212, 275.
- technical, compensation for (*qu.*), 110.
- to undivided part, 86.
- doubtful, 186—211. *And see* DOUBTFUL TITLE.
- express agreement to give good, 213.
- fraudulent misstatement as to, 61.
- investigation of, expenses of, recoverable by P., 135.
- "making a good," what, 325.
- marketable, 191.
- misdescription involving matter of, 357, 358, 362—365.
- notice to P. of defect in, 36, 236. *And see* NOTICE.
- objections to, what are, 269, 357—359.
- partner buying partner's share, may require what, 211, 212.
- possessory, 194.
- P. accepting, may object to undisclosed covenants, 225, 249.
- P. buying his own property, 58.
 - two lots may require good, to both, when, 87, 186, 425.
- P.'s knowledge of irremovable defect in, 211, 275.
 - liability of leaseholds to forfeiture, 212.
 - negated by agreement to give good, 213.
 - removable defect in, 211.
 - restrictive covenants, 212.
 - that V. has only leasehold interest, 6, 212.
 - under-lease, 68.
- root of, what is a good, 237—244.
- "showing a good," what, 325.
- "subject to approval of P.'s solicitor," 213.
- "such as V. has," 218, 220, 221, 235, 236, 257.
- tenure &c. not stated, V. must show title to freehold, 185.
- V. having no, at all,
 - cannot enforce condition as to requisitions, 270.
 - for rescission, 359.

TITLE—*continued*.

- V. having no, at all,
 - cannot obtain sp. perf., 234—237, 277.
 - condition may preclude P. from recovering deposit, 237, 271, 418.
 - Court will not attempt to sell, 443.
 - proof of, *onus* of, is on P., 235.
 - P. may rescind at once, 311-314.
- V. selling his "interest (if any)," 236.
- V.'s carelessness in stating, not wilful default, 322.
- duty to know his own (*qu.*), 226.
- waiver of right to, 271, 273—277.
- what, P. is entitled to by implication, 185.

TITLE DEEDS, 399—408.

- acknowledgment of right to production, 405—408.
 - by P. of largest lot in value to other P.'s, 429.
 - condition relieving V. from procuring, 407.
 - expense of, 414.
 - on sale by mortgagor, 407.
 - what deeds must be included in, 405.
 - when P. must give, 408.
 - where V. has not possession of deeds, 406.
- attested copies of, 400, 408, 414, 430.
- condition that certain, are "all the deeds in V.'s possession," 224.
- delivery of, on completion, 403, 404.
 - on sale in lots, 429.
 - without abstract, is not enough, 262.
- discovery of, by P. in V.'s action for sp. perf., 217, 402.
- how to be abstracted, 265, 266.
- lost, 400.
 - proof of stamping, not required, 401.
 - recitals of, 196, 401.
 - secondary evidence of, what is, 400.
- production of,
 - condition relieving V. from duty of, 401, 407.
 - covenant for, 405—408.
 - dated prior to abstract, 241.
 - equitable right of, sufficient, 406.
 - expense of, 401, 409.
 - for inspection, 402.
 - though P. not entitled to abstract, 263, 402.
 - verification of abstract, 399.
- instruments of record, 399.
- place of, 402.
- preparation of conveyance before, expense of, 136.
- retention of, by V., 403, 404.
- undertaking for safe custody of, 405.
- what are, 399.

TRADE

- being carried on, P. entitled to infer no covenant against it, 50.
- covenants restraining, 47, 50, 74, 92, 248.
- property bought for, time essential, 303.

TRANSFER

- of public-house licence, 397.

TRAVELLING. *See* JOURNEYS.TREES. *And see* TIMBER.

- shown on plan, 16, 43.

TRESPASSER,

- P. entering before payment of purchase money is a, 333.
- V. liable for damage done by, when, 351.

TRUST,

- breach of, objection to, covered by condition, 230.
- V. cannot be compelled to commit, 97, 105.

TRUSTEE, 431—440.

- bare, selling under order of Court, relief against, in case of "common mistake," 59.
- compensation, condition for, when enforced against, 105, 437.
- concurrence of *cestuis que trust*, 380.
- P. must allow reasonable time for (*qu.*), 313.
- condition that purchase money shall be paid to solicitor, 316.
- covenant for production by, how limited, 406.
- covenants for title by, 386, 387.
- where trustee becomes lunatic, 385.
- depreciatory conditions employed by, 433—439.
- duty of, to sell in provident manner, 433.
- is sufficient description for Statute of Frauds, 451.
- joint sale by, purchase money must be properly apportioned, 431.
- may employ counsel to draw conditions, 431.
- let auctioneer receive deposit, 433.
- not sell land without the timber, 433.
- sell in lots, 431.
- jointly with others, when, 431.
- leaseholds in lots by sub-demise, 439.
- subject to building restrictions, 439.
- with condition allowing compensation, 437.
- for rescission, 438.
- reserved bidding, 431.
- misdescription by, compensation for, when, 105, 437.
- misleading condition as to concurrence of, 224.
- mortgagee selling under power, how far a, 440.
- neglecting to sue P. for damages for default, 424, 438.
- not compelled to commit breach of trust, 105.
- of freehold land society, power to sell, 223.
- omission by, to mention manorial rights, 439.
- partial owner acting as agent for, 106.
- personal undertaking to clear off mortgage, 97.
- purchasing, suspicion of unfairness, 199.
- railway company selling surplus land, is not, 431.
- relief against, for "common mistake," when, 59.
- selling at undervalue, 198.
- leaseholds, requiring indemnity, 394, 395.
- to tenant for life, title not made doubtful, 199.
- without power to sell, 105.
- tenant for life under Settled Land Act, 1882, is, 431.
- undertaking by, to clear off incumbrances, 97.
- V. how far a, for P., 340, 341.

TRUSTEE IN BANKRUPTCY,

- P.'s, concurrence of, 197, 380.
- repudiating contract, not entitled to deposit, 419.

TURNPIKE

- trustees, selling road, 96.

UNAUTHORISED

- act of agent, 148.
- misrepresentation by agent, 29, 64, 148.
- purchase, 149.
- sale "without reserve," 166.

UNCERTAINTY

- of undertaking by V., 9.

UNDERGROUND CULVERT, 33, 34, 46, 92, 284, 285, 287, 295, 364.

UNDER-LEASE

- described as "derivative lease," 41.
- "lease," 41, 51, 68, 73, 83, 286.
 - condition refusing compensation, 281.
 - effect of condition as to lessor's title, 240.
 - reversioner promising to concur, 358.
- evidence of performance of covenants, receipt for rent, 258, 260.
- general condition as to, 50, 231, 436.
- in excess of head-lease, condition as to, 229.
- known to V. but not disclosed, 231.
- surrender of, agreement to procure, 214.
- title, commencement of, 239, 240.
- V. need not state that, is liable to forfeiture, 36.

UNDERTAKING

- by trustees personally to clear off incumbrances, 97.
- compensation for failure to perform, 101.
- implied, as to repairs, 9.
- notice excluded by express, when, 213.
- parol, 143, 145, 146.
- representation of intention, may be treated as, 20, 21, 22.
- specific performance of, when decreed, 9, 97, 98, 101.
- to build a church, 143.
- to make road, 9, 45, 46.
 - does not bind V. as to width, 46.
 - V.'s inability to perform, 98, 101.

UNDERVALUE,

- trustee selling at, title bad or doubtful (*qu.*), 198.

UNDIVIDED SHARE, 85, 86, 100, 116, 222.

UNFAIRNESS,

- suspicion of, makes title doubtful, 198—201.

UNUSUAL

- agreement as to tenant right, should be mentioned, 38.
 - tenant's fixtures should be mentioned, 177.
- conditions, construction of, 160.
- covenants in lease, 20, 27—29.

UNWILLING, 365—368. *And see* RESCISSION.

USER,

- P.'s intended, known to V., 13, 295, 304, 353.

USUAL

- covenants, what, 27—29, 395.
- incidents of tenure, need not be mentioned, 36.
- stringent conditions described as, 162.

VACANT

possession, P. entitled to, when, 334.

VAGUENESS

of agreement, 9.
conditions as to title, 226—232.
description, 59.

VALUATION,

agreement for, ineffectual, 180.
arbitration distinguished from, 182.
compensation to be assessed by, 111, 291.
Court will not set aside, 179.
“fair,” agreement to sell at a, 179.
injunction compelling V. to allow, 181.
misstatement as to, 19.
of non-essential adjuncts, 181.
of timber and fixtures, 140, 176, 179, 181.
P. telling valuer he would not complete, 181.
tenant's, paid by V. and deducted, 341.
 special agreement as to, 38, 50.
 fixtures in public house, 182.
V. not bound to disclose result of, 35.

VALUE.

“estimated,” 4, 283.
misleading statement as to, of timber, 4, 68.
misstatement as to yearly, 2, 283.
speculative statement as to, 18, 19.
statement of former mortgage as test of, 6.

VARIATION

between parcels in title deeds and in particulars, 250—254.
parol, 139—151. *And see* PAROL.

VAULTS,

parol agreement to make, dry, 143.

VENDOR

bidding, on sale “without reserve,” 166, 167.
claiming compensation, 284, 298.
in possession, liable for deterioration, 347—353.
insufficient description for Statute of Frauds, 451.
“interest of,” in the property, sale of, 220, 221, 236, 257.
knowledge of. *See* KNOWLEDGE.
mistake of, not sufficient ground for relief, 55.
rescinding under condition, 355—375.
suing for sp. perf. *See* SPECIFIC PERFORMANCE.
trustee for P., how far, 340, 341.
with partial interest selling as agent for trustees, 106.

VENDOR AND PURCHASER SUMMONS. *See* SUMMONS.**VERBAL**

collateral agreement, 145, 146, 154.
statement by auctioneer, 43, 148, 149.
 correcting misdescription, 140.
 misstatement of title, 141.
 inconsistent with written contract, 146.
 not heard by P., 68, 148, 149.
undertaking, 143, 145, 146.
variation of contract, 139—151.

VERIFICATION

of abstract, 135, 276, 399.

VIEW,

representation that V. cannot obstruct, 23.

VOID,

"agreement to be," meaning of phrase, 364, 374.

VOLUNTARY DEED,

condition as to invalidity of, 224.

making, root of title, 238, 244.

non-revocation of, inferred from recital of sale under it, 255.

proof that no subsequent consideration has made, good, 224.

title doubtful because of, when, 193, 201.

WAIVER,

by purchaser

of requisitions, 273—277, 370.

of objection to title, not of right to compensation, 221, 277.

but not of right to object V. has "no title at all," 277.

of right to make appropriation, 353.

rescind for delay in delivery of abstract, 264.

where time of the essence, 307—309, 312.

partial, 276, 277.

by vendor

delivery of supplemental abstract is not (*qu.*), 366.

of right to rescind under condition for rescission, 370—373.

by bringing action for sp. perf., 372.

by unreasonable delay, 371.

of right to treat requisitions as waived, 272.

effect of words "without prejudice," 264, 273, 308, 371.

in pleadings, of requisition, effect of, 372.

may be by parol, 150, 151.

of breach of covenant, condition as to, 222, 223, 257—260.

essentiality of time for completion, 307—309.

pro tanto, by extension of time, 308.

WALL, 3, 90, 283. *And see* PARTY-WALL.

WARRANTY

as to drainage, 146, 154.

possession, 335.

collateral, 154.

damages for breach of, 132, 145.

after completion (but *qu.*), 154.

none on agreement for lease of minerals, 3.

of agency, 132.

verbal, 10, 154.

WASTE. *And see* DETERIORATION.

sale of life estate of bankrupt unimpeachable for, 439.

WATER

supply, agreement to procure, 391.

supply of, misdescribed, 5, 89, 296.

WATERCOURSE

essential defect, 92, 94, 287, 295.

condition for compensation, precluded by condition for rescission, 364

latent defect, 26.

WATERCOURSE—*continued.*

- liability to maintain, essential defect, 92.
- marked on plan, 46.
- notice of underground, 33, 34, 69, 248.

WATERWORKS

- company, conveyance by, made root of title, 223
- misdescription as to rental from, 269.

WAY. *And see* ACCESS; ROAD; EASEMENT.

- right of, absence of, is not a matter of title, 185.
- auctioneer selling without reserving, 148.
- essential defect, 290.
- latent defect (*qu.*), 21, 33.
- over "building land," 25.
- plan showing (*qu.*), 44.
- reserved though not expressed, when, 44.
- verbal stipulation, reserving, to V., 140.
- to property, implied in contract, 185.
- soil of, 3, 45, 382.
- statement that, had been legally stopped, 62.
- title on agreement to grant lease and right of, 241.

WEEKLY TENANCIES,

- collection of rents of, by agent, V.'s liability for, 341.

WELL, 5, 34.

WHARF,

- length of, misstated, 87, 287.
- no title to, 87.

WIDTH,

- undertaking to make road, does not bind V. as to, 46.

WIFE. *And see* MARRIED WOMAN; DOWER.

- husband and, selling wife's land, 100.

WILFUL DEFAULT.

- account of rents on footing of, 155, 341.
- appropriation of purchase money, in case of V. s, 331.
- damages for, 130—133, 335.
- what, 320.

WILL,

- how to be abstracted, 266, 410.
- not affecting the land, production of, 405, 406.
- not registered in Middlesex, 238, 261.
- probate of, V. must produce office copy, 399.
- proof of seisin necessary, if root of title is, 338.

WINDFALLS

- belong to P., 338.

WINDOW

- broken by vagrants, V. liable for, 351.
- no inference as to easement of light, 34.

WITHDRAWAL

- of property from sale, 171.

WOMAN

- past childbearing, 115.
- W.

WOODLAND,

- compensation for misdescription of, 115.
- misleading statement as to produce of, 4, 68.

WORDS,

- "about," 4.
- "admit," 221, 222.
- "after," 268. *Add.*
- "amply secured," 18, 26.
- "annual rental," 2.
- "apportioned rent," 2.
- "arbitrary fines," 7.
- "assume," 221, 383.
- "bonded sugar refinery," 7.
- "brick-built," 16, 89.
- "building land," 8, 25, 48, 357, 364.
- "business premises," 26.
- "by and at the expense of," 407.
- "by estimation," 4.
- "clear yearly rent," 2.
- "client," 451.
- "conclusive," 222, 258.
- "convenient," 16.
- "default," 320, 323.
- "derivative lease," 41.
- "desirable," 17.
- "dispute," 374.
- "fair value," 179.
- "fertile," 15.
- "fit for the London market," 17.
- "free public house," 1.
- "from," *Add.*
- "frontage," *Add.*
- "ground rent," 2, 74, 290.
- "guarantee," 9.
- "inquiry," 1, 218.
- "insist," 369, 370.
- "largest lot," 429.
- "made up," 97, 122.
- "make," 369.
- "misstatement," 283.
- "more or less," 3, 4, 252, 296.
- "nearly equal to freehold," 18.
- "necessary," 9.
- "negotiation," 371.
- "newly built," 9.
- "objection," 219.
- "on the north side of," 6.
- "outgoings," 344.
- "peremptory sale," 167.
- "probable amount," 4.
- "proprietor," 452.
- "refuse," 375.
- "rent-charge," 2.
- "require," 217.
- "reserved bidding," 165.
- "satisfactory title," 213.
- "similar," 2, 396.
- "substantial," 16, 24, 290.
- "tithe free," 90, 97.
- "until," *Add.*
- "unwilling," 365.
- "up to," *Add.*
- "usual covenants," 28.
- "void," 364, 374.
- "wilful default," 320.
- "without prejudice," 264, 273, 308, 371.
- "28th Dec. next," 301.

WORK

- done pursuant to notice of local authority, 344.

YARD,

- want of title to, 87, 290.

YEARLY TENANCY

- described as tenancy at will at yearly rent, 2.

YORKSHIRE REGISTRY,

- memorial, evidence of lost deed, 400.
- registration in, P. bears expense of, 412.



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